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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 732

GEORGE M. BECHTEL, Executor of the Will of MARTHA R. BECHTEL, Deceased, GEORGE M. BECHTEL and HAROLD R. BECHTEL,
Petitioners,

vs.

ILA FAY THATCHER, NANCY ROSSEAU, ELERY SCOTT and STATE OF IOWA, ex rel J. B. Woods.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

WAYNE G. COOK,
of Davenport, Iowa,
Counsel for Petitioners.

COOK, BLAIR & BALLUFF,
of Davenport, Iowa,
Of Counsel.

SUBJECT INDEX.

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PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

The petition of George M. Bechtel, Executor, et al, respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This Petition is concerned with constitutional and other limitations on the right of the courts of one state to regulate the internal affairs of corporations created under the laws of other states, and to disregard the contract between the stockholders, created by the charter and the laws of the domiciliary State, governing the reclassification of shares of stock.

Involved is the validity of 39,468 shares of common stock of Iowa Southern Utilities Company of Delaware, a Delaware corporation operating as a public utility company in the State of Iowa under a permit as a foreign corporation.

Prior to 1933 that Corporation had issued and outstanding 100,000 shares of common stock without nominal or par value but representing $1,000,000.00 of capital, and 80,102 shares of cumulative preferred stock of the par value of $100 per share representing capital of $8,010,200.00.

Prior to August 1, 1938 the common stock was all owned by Martha R. Bechtel and the preferred was divided among approximately 4000 holders.

As of August 1, 1938 a plan of recapitalization and reclassification of the stock of the corporation was adopted by vote of the holders of a majority of each class of stock. Pursuant to that action the 100,000 shares of original common stock of Martha R. Bechtel were converted or transmuted into 39,468 shares of new common stock with a par value of $15.00 per share and the 80,102 shares of original preferred stock were converted or transmuted into approximately 320,000 shares of identical new common stock.

Action was commenced in November, 1939 in the District Court of Iowa in and for Jasper County in the name of the State of Iowa, on the relation of a citizen of that State who was neither a stockholder, nor a customer of Iowa Southern Utilities Company of Delaware, against that corporation, the present Petitioners and a number of individual holders of preferred stock.

Plaintiff alleged that in the issuance of its preferred and common stock, the corporation had violated the provisions of certain Iowa statutes applicable to foreign public utility corporations, then appearing in Chapter 387 of the Iowa Code of 1935, as a result of which much, if not all, of its preferred and common stock was void.

The respondents, Ila Fay Thatcher and Nancy Rosseau who had been the owners of 17 shares of original preferred stock intervened in the action, joining with the plaintiff in claiming violations of the provisions of Chapter 387, but averring that their shares were neither issued, nor held in violation of those statutes and were therefore valid shares. When their pleading was attacked on the ground that it injected a distinct cause of action not joinable with that of the plaintiff, these interveners disclaimed any such intention and claimed merely to be asserting the same claims as the plaintiff, except for their defense that their shares had been fully paid for in cash and were not void.

The defendants denied that the corporation had violated any of the statutes of Iowa, and alleged that the reclassification of the shares of stock was authorized by its charter and the laws of Delaware and was accomplished in strict accordance therewith.

The trial court specifically found that, except in one minor respect which did not affect the validity of its stock or warrant any relief, the corporation had not violated any of the provisions of Chapter 387. It therefore dismissed plaintiff's action and rendered judgment against the relator for sixty per cent of the costs.

The trial court further found that the original common stock, all of which had been issued to the Bechtels and which on the eve of the reclassification was owned by Martha R. Bechtel, had been paid for in full in property as specifically authorized by the Executive Council of the State of Iowa, and was valid, outstanding stock of the corporation.

However, the trial court made a finding that at the time of the reclassification the old common stock was worthless and that permitting it to be transmuted into new common along with (although in far less proportion than) the preferred stock, was inequitable and unfair to the holders

of the original preferred. Upon this finding the trial court decreed void the new common stock derived from the old common and directed that its holders should not be recognized as the holders of new common stock or reinstated to their original status.

Appeals were prosecuted to the Supreme Court of Iowa by the plaintiff from the portion of the decree dismissing its cause of action and by the Bechtels from the portion invalidating their shares. The Supreme Court of Iowa affirmed on both appeals on April 6, 1948. No petition for rehearing was filed by plaintiff and the decree against the plaintiff became final. Petitioners filed in due time a Petition for Rehearing. This was denied November 19, 1948.

B.

PETITIONER'S BASIC CONTENTIONS IN THE SUPREME COURT OF IOWA

were:

1. That the validity of the reclassification of stock was attacked only on the ground that it was issued and held in violation of the provisions of Chapter 387 of the Iowa Code of 1935 and the question of fairness or equity of the plan as between stockholders was not in issue.

2. That in decreeing Petitioner's shares void on grounds other than the violation of the statutes of Iowa the Court decided an issue which was not before it and deprived Petitioners of their property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

3. That in decreeing said shares void the Courts of Iowa refused to give full faith and credit to the statutes and laws of Delaware as required by Section 1 of Article IV of the Constitution of the United States.

4. That in holding the plan effective as to the holdings of the original preferred stockholders but void as to those of the common stockholders the Court substituted its judgment for that of the stockholders to whom it was delegated by the laws of Delaware and denied full faith and credit to the corporation laws of Delaware and deprived Petitioners of their contractual rights and of their property without due process of law in violation of Section 1 of Article IV of the Constitution of the United States and of the Fifth and Fourteenth Amendments.

C.

STATEMENT OF BASIS OF JURISDICTION.

The Applicable Statute.

The statutory provision believed to sustain the jurisdiction of this Court to allow the writ is paragraph (b) of Section 237 of the Judicial Code (Act of February 13, 1925), providing that it shall be competent for the Supreme Court, by certiorari, to review any case "where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution".

Time and Manner of Raising Federal Questions.

The contentions, 1) that the decree cancelling Petitioner's shares of stock was not responsive to any issue and therefore deprived them of their property without due process of law; and, 2) that the refusal to restore Petitioners to their former position as holders of original common stock similarly deprived them, arose only at the conclusion of the case in the trial court. They were raised in the Supreme Court of Iowa in Appellant's opening brief. (Appellant's Brief, Div. V, page 84; Rec. p. 463), and were

urged throughout the proceedings in that court and in the Petition for Rehearing (Pet. for Rehearing, Div. V; Rec. p. 528), and the brief in support thereof (Rec. pp. 563-577).

The contention that the reclassification of the shares of stock was controlled by the laws of the State of Delaware was raised in the Answers of the defendant corporation (Div. II, Ans. of corporation, Rec. p. 233 et seq.) and of Petitioners and other individual defendants (Div. II, Ind. Answers, Rec., p. 263; ibid., Div. VII, Rec. 265).

The contention that the decree refused full faith and credit to the General Corporation Law of Delaware was urged in the Supreme Court of Iowa both in the brief (Appellant's Brief, Div. V, p. 84; Rec. p. 463) and in the Petition for Rehearing and brief in support thereof. (Pet. for Rehearing, pages 4, 38-52; Rec. pp. 528, 38-577).

Decision Adverse to Petitioners in Contravention of the Constitutional And Property Rights Asserted.

The Supreme Court of Iowa affirmed the following findings of the trial court:

a) That the corporate defendant had not violated the provisions of Chapter 387 of the Iowa Code of 1935 in the issuance of any of its preferred or common stock (Concl. of Law, Rec. pages 348-350);

b) That the original common stock was validly issued and was valid outstanding stock at the time of the reclassification. (Finding n., Rec. p. 335; Finding u-1, Rec. p. 340; Finding u-e, Rec. p. 342; Conclusions of Law, Rec. p. 348);

c) That the reclassification was authorized by and was consummated in strict accordance with the laws of the State of Delaware (Finding u, Rec. pages 340-343; Concl. of Law G, Rec. p. 349);

d) That by the vote of the holders of a majority of the shares of both classes, the stock of the corporation was *ipso facto* transmuted into new common stock (Finding u-4, Rec. p. 342; Concl. of Law J, Rec. p. 350).

Nevertheless, it held the shares of new common derived from the original common, void, and affirmed the trial court's conclusion that because the original common had become worthless by the time of the reclassification, its reclassification was unfair to the former preferred shareholders (Finding v, Rec. p. 343; Finding aa, Rec. p. 346). It affirmed the decree (Rec. p. 350) declaring such shares void and forbidding their recognition or reinstatement by the corporation. (Rec. p. 481 et seq). In so doing it determined against Petitioners their contentions summarized in Division B, *supra*, and gave finality to a decree violating the due process and full faith and credit clauses and the rights of Petitioners specially set up and claimed by them under the Constitution of the United States.

D.

THE QUESTIONS PRESENTED.

1. Whether the determination of a matter not within the issues as interpreted and announced by the trial court and construed by the parties constitutes due process of law within the meaning of the Fifth and Fourteenth Amendments to the Constitution of the United States.

2. Whether the refusal of the Iowa Courts to give effect to a plan of reclassification of the stock of a Delaware corporation effected in accordance with its charter and the laws of Delaware constitutes a denial of full faith and credit to the laws of that state, where no violation of the laws of Iowa is found.

3. Whether an Iowa court of equity may substitute its judgment for that of the stockholders of a Delaware corporation without violating the contractual rights of the stockholders and depriving them of their property without due process of law and denying full faith and credit to the laws of Delaware.

4. Whether, in the absence of allegations and proof of fraud, an Iowa court of equity may cancel shares of stock derived, in a reclassification valid under the laws of Delaware, from shares valid under all applicable laws, merely because the transmuted shares may have become worthless from a balance sheet standpoint, without violating the full faith and credit clause of the Constitution.

5. Whether, in the absence of allegation and proof of fraud, an Iowa decree invalidating one class of stock of a Delaware corporation reclassified in accordance with the laws of Delaware, without restoring the *status quo ante*, violates the constitutional prohibition against taking property without due process of law.

E.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

Petitioners believe the case to be such as to merit a review by this Honorable Court. The private rights involved are substantial. Conservatively estimated, the shares of stock invalidated by the decree have, and had at the time of the affirmance, a value in excess of $400,000.00.

The questions presented are likewise of real importance. The decree determines that the courts of a State in which a foreign corporation is licensed to do business may not only review the acts of the corporation and its stockholders validly done under the charter and laws of the domiciliary

state, but may change the relative rights of the stockholders in entire disregard of the contract and of the laws governing their status. It likewise determines that property rights conferred by the laws of the State of incorporation pertaining to shares of stock valid under the laws of that State and in no way contravening the law of the forum, may be cancelled, merely because at the moment it would have no value in the event of liquidation. It determines not only the right to review a plan of recapitalization and reclassification of stock approved by the stockholders pursuant to express authority of the charter and laws of the domiciliary State, but the right to revise that plan in a way which the laws of the domiciliary State do not permit its courts to do. It not only cancels the shares which petitioners derived from stock which the Court held valid, but it refuses to restore the original shares.

The validity of such holdings under the Constitution are of fundamental importance, not only to these Petitioners, but to corporations and stockholders generally, to the states whose statutes should control corporations created pursuant to them, and to the defendant corporation, which, while it may properly be indifferent to the immediate consequences as between stockholders, is faced with the necessity of reconciling conflicting views as to the effect of its proceedings on its capital structure.

WHEREFORE, your Petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Iowa, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered on its docket, No. 46686, State of Iowa, ex rel J. B. Weede, Appellee v. Martha R. Bechtel et al, appellants, and that the decree and judgment of the District and Supreme

Courts of Iowa may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

GEORGE M. BECHTEL, Executor of the Will of MARTHA R. BECHTEL, Deceased.

GEORGE M. BECHTEL,

HAROLD R. BECHTEL.

BY WAYNE G. COOK,

Counsel for Petitioners.

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ILA FAY THATCHER, NANCY ROSSEAU, ELBERT SCOTT and STATE OF IOWA, ex rel J. R. Weede,

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

WAYNE G. COOK,
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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

THE OPINIONS BELOW.

The opinions of the Supreme Court of Iowa affirming the judgment of which review is sought are published in 31 N.W. (2d) 853, but have not yet appeared in the Iowa reports. They are printed in the Record commencing on page 484.

The opinions on an earlier appeal in which the sustaining of a motion to dismiss was reversed, are published in 231 Iowa 784 and 2 N.W. (2d) 372, with supplemental opinion on rehearing published in 4 N.W. (2d) 869. They appear in the Record at page 85 et seq. Petitioners regard these opinions as material in the present proceeding only

because the opinion on the final appeal adopts views as to the effect of the Delaware corporation laws expressed in the earlier opinion of Justice Bliss.

THE FINDINGS AND DECREE.

The Findings of Fact, Conclusions of Law and Decree of the District Court are set forth in the Record commencing on page 329. The affirmance is shown at page 481 and the denial of petition for rehearing at page 591.

II.

STATEMENT OF THE CASE.

The general nature of the case is briefly stated in Division A of the Petition for the Writ, but further elaboration seems necessary because the case as brought by the plaintiff involved an entirely different cause of action than that which the trial court decided and the Supreme Court of Iowa affirmed against the Petitioners.

The action was commenced in November, 1939 in the name of the State of Iowa, on relation of J. B. Weede, a citizen of that State, pursuant to the provisions of Chapter 387 of the Iowa Code of 1939. Section 8438, appearing in that chapter, authorizes the attorney general, or a citizen, to bring an action in the name of the State, against foreign public utility corporations alleged to have violated the Iowa Statutes regulating the issuance of stock by such corporations operating in the State under permits as foreign corporations.

The plaintiff and relator charged the defendant, Iowa Southern Utilities Company of Delaware with various violations of the provisions of Chapter 387 of the Iowa Code in the issuance of shares of its original common and preferred stock and in exchanging certificates of new com-

mon stock for those of original common stock and original preferred stock, under a plan of recapitalization and reclassification adopted August 1, 1938. (See Plaintiff's Petition, Rec. p. 4, *et seq.*).

The present Petitioners, as holders of the original common stock, and a number of other individuals, as holders of the original preferred stock, were made parties defendant on the ground that the shares issued to them were void because of the corporation's non-compliance with those Iowa statutes.

The relief sought included the appointment of a receiver, the winding up of the affairs and business of the corporation, and the determination of what shares of its stock were issued and held in violation of the provisions of Chapter 387, and a decree that such shares were void. (See prayer of plaintiff's petition, Rec. p. 26 *et seq.*).

The corporate defendant attacked the plaintiff's petition by a motion to dismiss, equivalent in its legal effect to a demurrer, primarily on the ground that the facts alleged did not entitle the plaintiff to relief. (Rec. p. 69). This motion was sustained (Rec. p. 78) and the plaintiff prosecuted an appeal to the Supreme Court of Iowa. That Court reversed the judgment of dismissal and remanded the case for trial on the merits.

In the meantime, Ila Fay Thatcher and Nancy Rosseau, two of the present Respondents, had filed a pleading which they denominated an "Intervening Answer" (Rec. p. 74). They had been holders of seventeen shares of the preferred stock of the defendant corporation.

Counsel for the corporate defendant moved to strike this intervening pleading on the ground, among others, that it introduced a separate and distinct cause of action in respect of the relative rights of preferred and common stockholders, which, as the Iowa procedural statutes then stood, could not be joined with the cause of action of the

plaintiff. (Rec. p. 206, *loc cit.* p. 207, line 6, p. 208, lines 5, 10, 20).

The Intervenors filed a resistance to this motion (Rec. p. 211), in which they disclaimed any intention to assert any independent cause of action and averred that they sought only to defend the validity of their shares and to join with the plaintiff in its claim that certain of the common and preferred stock was issued and held in violation of Chapter 387.

The motion to strike was overruled by the trial court (Rec. p. 215).

After the remand at the conclusion of plaintiff's appeal the defendants filed their answers (Rec. pp. 223, 254), in which they denied the alleged violations of Chapter 387 and pleaded the General Corporation Law of Delaware and the facts bringing the reclassification within the provisions thereof (Rec. p. 71, line 30; Rec. p. 94, line 27).

The intervenors were represented by independent counsel (Messrs. Clark, Pryor, Hale & Plock) until after the judgment in the trial court was rendered, when such counsel withdrew and counsel who had represented the plaintiff and relator entered their appearances for the intervenors. (Rec. p. 154). Neither the intervenors nor their counsel actually appeared at the trial and no evidence was specifically offered on their behalf (See Reporter's Transcript, p. 41 and throughout).

The trial court, not once, but many times throughout the trial and the preliminary proceedings, defined the issues as limited to whether the defendant corporation had in fact violated the provisions of Chapter 387 in the issuance of any of its shares of stock (Reporter's Trans. 54-56, 495-499, 2861, Trans. of Proceedings on Applic. for Production pp. 31-32, 39, 52-53, 95, 121, 134-142).

The decree cancelling the new common stock derived from the original common in that reclassification was

predicated upon a finding that the original common stock had become worthless because of the priority of funded debt, outstanding preferred stock and accumulated preferred dividends (Rec. p. 346, line 8, p. 343, line 9), and the conclusion of the court that the plan of reclassification approved by the stockholders was unfair and inequitable in allowing the holder of the old common stock an 11% equity in the reorganized structure. (Rec. p. 343, line 9, p. 349, line 22).

The trial court did not set aside the plan. It held the new common stock in the hands of the old preferred stockholders, valid, but cancelled the new common stock derived from old common, and specifically decreed that the present Petitioners should not be recognized by the corporation as stockholders, or as having any equity attributable to their original holdings (Rec. p. 350, line 22).

III.

SPECIFICATION OF ERRORS.

1. The Iowa courts erred in finding and holding that any issue was raised or litigated, involving the rights of the stockholders *inter sesse*, or the validity of the Petitioners' shares on grounds other than that they were issued and held in violation of the provisions of Chapter 387 of the Code of Iowa.

2. The Iowa courts erred in finding that Petitioners' shares of new common stock, derived from the original common stock under the plan of reclassification approved by the stockholders, could be cancelled because the plan was unfair to the holders of the original preferred stock, and in decreeing such shares void.

3. The Iowa courts erred in cancelling the Petitioners'

shares of common stock, derived as aforesaid, without restoring the *status quo ante.*

4. The Iowa courts erred in finding and holding that the reclassification was not controlled by the charter and the laws of Delaware, and, having been accomplished in strict accordance therewith, was not binding upon all stockholders.

IV.

BRIEF POINTS AND AUTHORITIES.

1. THE IOWA COURTS ERRED IN FINDING AND HOLDING THAT ANY ISSUE WAS RAISED OR LITIGATED, INVOLVING THE RIGHTS OF THE STOCKHOLDERS *INTER SESSE,* OR THE VALIDITY OF THE PETITIONERS' SHARES ON GROUNDS OTHER THAN THAT THEY WERE ISSUED AND HELD IN VIOLATION OF THE PROVISIONS OF CHAPTER 387 OF THE CODE OF IOWA.

a) The State of Iowa had no legal interest in any cause of action between stockholders as to their relative rights or the fairness of a plan of reclassification proposed and adopted pursuant to the laws of Delaware, and there could have been no issue in respect of those matters, between the *plaintiff* and the stockholder defendants.

Real Party in Interest Statute, Sec. 1096, Iowa Code of 1939.

Rule 2, Iowa Rules of Civil Procedure.

See Arg. in Supreme Court of Iowa, Div. I-A, Rec. p. 402.

b) There was no issue between the Intervenors and the defendant stockholders regarding the fairness or equity of the reclassification and no claim that Petitioners' shares were invalid for any reason other than that they might have been issued or held in violation of the provisions of Chapter 387 of the Iowa Code.

1) Such a claim would have constituted a distinct cause of action which could not properly have been joined with that of the plaintiff.

Iowa Code, 1939 Sec. 10960, 10969, 11130.

(See Brief on Petition for Rehearing, Rec. p. 536.)

2) The pleading of the Intervenors does not assert any claim of invalidity of any shares, except for violations of Chapter 387.

Intervening Answer, Rec. p. 202.

3) The Intervenors expressly disclaimed that their intervening answer was intended to raise any issue or assert any cause of action independent of that of the plaintiff under Chapter 387.

See, Resistance to Motion to Strike Intervening Answer, Rec. p. 211.

For Analysis of Intervenor's pleading, see Appellants' brief in Supreme Court of Iowa, Rec. p. 418, et seq.

c) The fairness of the reclassification as between stockholders, and the validity of Petitioner's shares independently of the charge that they were issued in violation of the provisions of Chapter 387, were not voluntarily litigated.

1) The Intervenors who alone had standing to

litigate those questions did not appear and were not represented by counsel at the trial.

(See Reporter's Transcript, p. 41 and throughout).

2) The offer of evidence germane to issues raised by the pleadings between plaintiff and the defendants, or the failure to object to such evidence when offered, should not be construed as a waiver of an improper joinder, or as the voluntary litigation of issues not raised.

Luther v. C. J. Luther Co., 118 Wis. 112, 94 N.W. 69, cited and discussed in Petition for Rehearing, Rec. p. 544-550.

2. THE IOWA COURTS ERRED IN FINDING THAT PETITIONERS' SHARES OF NEW COMMON STOCK, DERIVED FROM THE ORIGINAL COMMON STOCK UNDER THE PLAN OF RECLASSIFICATION APPROVED BY THE STOCKHOLDERS, COULD BE CANCELLED BECAUSE THE PLAN WAS UNFAIR TO THE HOLDERS OF THE ORIGINAL PREFERRED STOCK, AND IN DECREEING SUCH SHARES VOID.

a) The reclassification which gave rise to Petitioners' shares of new common stock which were declared void, was valid under the laws of Delaware and was binding upon non-assenting stockholders.

1) The laws of Delaware expressly confer upon Delaware corporations the right to reclassify their shares of stock by changing the "number, par value, designations, preferences, or relative rights of the shares".

Sec 26, General Corporation Law of Delaware, (Set out *in extenso* in the Record, pp. 390-394).

2) The reclassification was effected strictly in accordance with the Delaware statute.

Conclusion of Law G. Rec. p. 349, line 10.

3) The provisions of Section 26 of the General Corporation Law of Delaware were a part of the charter of the corporation and as such constituted a contract binding upon all stockholders.

Morris v. American Public Utilities, 14 Del. Chancery 136, 122 Atl. 696.

Garey v. St. Joe Mining Co., 32 Utah 497, 573, 91 Pac. 369, 374.

Peters v. United States Mortgage Co., 13 Del. Chancery 11, 114 Atl. 598.

Wallace v. Motor Products Corp., 15 F(2d) 211.

Boyette v. Preston Motors Corp., 206 Ala. 240, 89 So. 746.

4) When a majority of the old preferred and the old common stock was voted in favor of the reclassification the old stock was *ipso facto* transmuted into the new, and the action was binding on non-assenting stockholders.

Trounstine v. Remington Rand, Inc., 22 Del. Chancery 122, 194 Atl. 95.

Romer v. Porcelain Products Co., Inc., 23 Del. Chancery 52, 2 A(2d) 75.

b) A general court of equity does not have power to change the contract between the corporation and its stockholders, or the relative rights of the stockholders, so as to wipe out, without liquidation, common stock, in favor of stock having priority only on liquidation.

1) In the absence of statutory or charter provisions for reorganization of corporations, changes

in the capital structure changing the relative rights of the holders of different classes of stock, can only be accomplished by unanimous consent.

15 Fletcher, Cyc. of Corps., Sec. 7212.

31 Yale Law Journal, 685.

Peters v. United States Mortgage Co., 13 Del. Chancery 11, 114 Atl. 595, 600.

Paton v. Northern Pacific Ry. Co., 85 Fed. 838.

Chable v. Nicaragua Canal Const. Co., 59 Fed. 846.

Wabash, St. Louis & Pacific Ry. Co., v. Central Tr. Co, 22 Fed. 138.

Shuler v. Southern Iron & Steel Co., 77 N. J. Eq. 60, 75 Atl. 552.

2) Section 26 of the General Corporation Law of Delaware permits it upon the affirmative vote of a majority of all classes of stock affected by the proposed change.

Sec. 26, Gen. Corp. Law quoted Rec. p. 390.

3) A court of equity has no power to declare void, stock which has been validly issued, merely because of a capital impairment, or because it finds it to have become worthless.

Fitzpatrick v. O'Neill, 43 Mont. 552, 118 Pac. 273.

Colonial Biscuit Co. v. Orcutt, 264 Pa. 40, 107 Atl. 315.

Devonian Products Co. v. Webster, 188 Iowa 1368, 177 N.W. 513.

11 Fletcher, Cyc. of Corps., 342.

c) Reorganization cannot be compelled by a court of equity without statutory authority, nor can the terms thereof be fixed by the court.

15 Fletcher, Cyc. of Corps., Sec. 7212.

Paton v. Northern Ry. Co., 85 Fed. 838.

Chable v. Nicaragua Canal Const. Co., 59 Fed. 846.
Wabash, St. Louis & Pac. Ry. Co. v. Central Tr. Co., 22 Fed. 138.

d) The original common stock was valid under the laws of Delaware and the laws of Iowa.

1) It was issued for property duly appraised by the Executive Council of the State of Iowa and was valid outstanding stock, representing $1,000,000.00 of the capital of the corporation.

Findings m and n, Rec. p. 335, line 11.
Concls. of Law A and B, Rec. p. 348, line 7.

2) The preferred stock had priority only as to dividends and upon liquidation.

See Amendment to Cert. of Inc., Exhibit P-34, par. g.

3. THE IOWA COURTS ERRED IN CANCELLING THE PETITIONERS' SHARES OF COMMON STOCK, DERIVED AS AFORESAID, WITHOUT RESTORING THE *STATUS QUO ANTE*.

a) The decree invalidating shares derived from the original common stock, without restoring the *status quo*, deprived Petitioners of rights which pertained to shares owned by them and valid under the laws of both Delaware and Iowa.

1) A plan of reclassification legally adopted will not be set aside unless the *status quo ante* can be restored.

Frank v. Wilson & Co., 24 Del. Chancery 237 9A (2d) 82.
Romer v. Porcelain Products Co., Inc., 23 Del. Chancery 52, 2 A (2d) 75.
Troustine v. Remington Rand, Inc., 22 Del. Chancery 122, 194 Atl. 95.

Shanik v. White Sewing Machine Corp., 25 Del. Chancery 371, 19 A(2d) 831.

Cleveland Printing Ink Co. v. Phipps, 30 Ohio App. 161, 16 4 N. E. 641.

2) A majority of the holders of both classes of stock voted in favor of the reclassification, which could not otherwise have been accomplished.

Finding u-1, Rec. pp. 340, 341.

Sec. 26 Gen. Corp. Law of Del., *supra.*

4. THE IOWA COURTS ERRED IN FINDING AND HOLDING THAT THE RECLASSIFICATION WAS NOT CONTROLLED BY THE CHARTER AND THE LAWS OF DELAWARE, AND, HAVING BEEN ACCOMPLISHED IN STRICT ACCORDANCE THEREWITH, WAS NOT BINDING UPON ALL STOCKHOLDERS.

a) The Supreme Court of Iowa held that the laws of Delaware relating to the reclassification of the stock of Delaware corporations did not control the reclassification in question.

See Div. VII of Opinion, Rec. p. 507.

1) One state or country has no visitorial powers over a corporation created by the laws of another and ordinarily its courts will not interfere in the internal affairs of a foreign corporation, even at the suit of a resident stockholder.

17 Fletcher, Cyc. of Corps., Sec. 8425.

Rogers v. Guaranty Trust Co., 288 U. S. 123.

Sternfield v. Toxaway Tanning Co., 290 N. Y. 294, 49 N. E. (2d) 145.

Wallace v. Motor Products Corp., 15 Fed. (2d) 211, (D. C. Mich.); Affirmed 25 Fed. (2d) 655.

Hogue v. American Steel Foundries, 247 Pa. 12, 92 Atl. 1073.

Boyette v. Preston Motors Corp., 206 Ala. 240, 89 So. 746.

Kelley v. American Sugar Refining Co., 139 Fed. (2d) 76, (1 CCA).

Langfelder v. Universal Laboratories, 293 N. Y. 200, 56 N. E. (2d) 550.

Graeser v. Phoenix Finance Co., 218 Iowa 1112, 254 N. W. 859.

Harris v. Weiss Engineering Corp., 44 N. Y. S. (2d) 643.

2) Reclassification of its shares of stock pursuant to its charter and the laws of the state of its domicile are peculiarly internal affairs over which jurisdiction should be declined by the Courts of other states.

Sternfield v. Toxaway Tanning Co., 290 N. Y. 294, 49 N. E. (2d) 145.

Wallace v. Motor Products Corp., 15 Fed. (2d) 211, Idem 25 Fed. (2d) 655.

Langfelder v. Universal Laboratories, 293 N. Y. 200, 56 N. E. (2d) 550.

Kelley v. American Sugar Refining Co., 42 N. E. (2d) 592, (Mass.).

3) The legality and the fairness and equity of a plan of recapitalization must be determined under the law of the state of incorporation and an inquiry with respect thereto involves interference with the management of the internal affairs of the corporation.

Hogue v. American Steel Foundries, 247 Pa. 12, 92 Atl. 1073.

Boyette v. Preston Motors Corp., 206 Ala. 240, 89 So. 746, 18 A. L. R. 1376.

b) The right of the defendant corporation to reclassify its shares by appropriate action of its stockholders is controlled absolutely by the laws of Delaware.

Cases cited under sub points 1) and 2), supra.

c) In refusing to apply the Delaware law and to give effect to the reclassification authorized by it, the Iowa courts violated the full faith and credit clause of the Federal Constitution and substituted their judgment for that of the interested stockholders.

McQuillen v. National Cash Register Co., 27 Fed. Supp. 639.

d) In holding void the shares derived by Petitioners under the reclassification plan, the decree deprives Petitioners of vested property and contract rights conferred on them by the Delaware law and protected by the full faith and credit and due process clauses.

V.

CONCLUSION.

Petitioners recognize that elaboration of the brief points in the previous division would verge upon an argument of the merits of the case rather than one for the granting of the writ. Nevertheless, the points there made are so closely interwoven with the constitutional questions involved as to require including them if the federal questions are to be seen in proper perspective. The record in the courts below was voluminous, consisting of several thousand pages of testimony and some twenty thousand exhibits. Practically all of this record was made on a branch of the case which is not involved in the present

application. The judgment in favor of the defendant corporation which exonerated it of all violations of the foreign corporation statutes of Iowa became final, along with the decree that the new common stock derived from the old preferred is valid. Nevertheless, there has been a constant tendency to confuse the issues and the opinions below do not disclose the questions in a clear-cut manner.

Until the conclusion of the trial in the District Court the defendant corporation was defending its own acts against the claims asserted by the plaintiff, the State of Iowa, that it had violated certain Iowa statutes applicable to it as a foreign corporation licensed to conduct a public utility business in the State. The present petitioners, as well as the intervenors and other holders of shares derived from the original preferred stock in the 1938 reclassification were interested so far as appeared, only because the consequences of the alleged violations might be to render their stock void. Their defense to the plaintiff's cause of action inhered in that of the corporation and was entirely successful.

However, when the trial court, after having indicated throughout the trial that the only matter involved was whether the corporation had violated the Iowa statutes, and apparently having forgotten that the Intervenors had expressly disclaimed any intention to assert an independent cause of action, and his own statements relative to the pendency of a separate stockholder's derivative suit in which the validity of the plan of reorganization was under attack, proceeded to pass upon the fairness of the plan as between preferred and common stockholders, the corporation and the common stockholders came to a parting of the way. Petitioners became appellants from the portion of the decree invalidating their stock and the corporation became appellee in plaintiff's appeal from the decree sustaining its defense.

Under the stipulation of the parties the brief and argument of Petitioners as appellants in the Iowa Supreme Court and their Petition for Rehearing are included in the Clerk's transcript and the printed Record in this proceeding. (Rec. pp. 380 and 525). Therefore we have limited the argument here to a summary of the points and authorities.

Petitioners' claim for review actually involves three fundamental contentions.

1. That where a court purports to decide an issue or pass upon a cause of action which it can be demonstrated was not within the issues and not voluntarily litigated, and which it would have been improper to join with that of the plaintiff, and which the only parties who had legal capacity to assert it, disclaimed, and who did not participate in the trial, due process is as effectually denied as though no notice and opportunity to defend had been afforded.

2. That the full faith and credit clause of the Constitution of the United States requires recognition of the validity of changes in the corporate structure authorized by and accomplished in accordance with the charter and laws of the state of incorporation.

3. That the full faith and credit clause and the clause prohibiting the taking of property without due process of law were violated by the decree which cancelled shares derived from stock which was valid under the laws of both Delaware and Iowa and which had been reclassified by the required vote of a majority of the stockholders, pursuant to express provisions of the governing law.

The Supreme Court of Iowa having finally refused to recognize Petitioners' vested contract rights, as guaranteed by the Constitution, their only hope of relief is that this honorable court will grant the writ and review the judgment.

Respectfully submitted,
WAYNE G. COOK,
Counsel for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No.————————.

GEORGE M. BECHTEL, Executor of the Will of
MARTHA R. BECHTEL, Deceased,
GEORGE M. BECHTEL and HAROLD R. BECHTEL,
Petitioners,

vs.

ILA FAY THATCHER, NANCY ROSSEAU, ELERY SCOTT and STATE OF IOWA, ex rel J. B. Weede.

REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION.

IN GENERAL.

The separate brief in opposition on behalf of the State of Iowa, ex rel., J. B. Weede requires no separate reply. The suggestion that Chapter 387 of the Iowa Code was enacted to prevent the "watering" of stock of foreign public utility companies in the interest of stockholders is fully met by the finding of the trial court that every share of the stock originally issued by the Iowa Southern Utilities Company of Delaware was fully paid for in money or in property under authority of the Iowa Executive Council. This

insured against any claim of dilution. The corporation received full value in money or property for all the shares representing its capital.

The reclassification effected pursuant to Section 26 of the General Corporation Law of Delaware and the Amendments of the charter of the corporation did not affect the value of the corporations assets, but merely reduced its capital and reclassified its outstanding shares by changing its common stock from 100,000 shares without par value, representing $1,000,000.00 of its capital, into 39,468 shares of common stock with a par value of $15.00 per share, and its 80,000 odd shares of cumulative preferred stock into approximately 320,000 shares of identical common stock with par value of $15.00 each.

Under the Delaware Law as pleaded and proven, the reclassification when approved by the holders of a majority of preferred and common stock, voting separately as classes, *ipso facto* accomplished a transmutation or conversion of the existing shares which was binding upon non-assenting as well as assenting stockholders and was automatically effective (See cases cited in Petitioner's original brief at p. 29 and testimony of Howard Duane, Official Reporter's Transcript pp. 1796-1870, loc. cit. 1852). There was no exchange of stock and no new issue of stock. There was nothing to which any statute contained or incorporated by reference in Chapter 387 of the Code of Iowa was applicable. The corporation admittedly received no new consideration. The stock which had been fully paid for when issued was simply changed pursuant to the contract between the stockholders and no question of dilution with which the laws of public policy of the State of Iowa are claimed to be concerned could possibly arise.

The very separation of the briefs on behalf of the relator and the other respondents is a recognition of the soundness of the position of Petitioners in contending that there

could not have been any issue between the State of Iowa, on the relation of a non-stockholder citizen, and Petitioners, in respect of the fairness of the plan of reclassification as between stockholders.

This reply will not attempt to cover all of the matters urged by the other Respondents as that would require a review of the testimony and the record in such detail that it is doubtful if the reply could be printed and filed in time to receive consideration. Suffice it to say that Petitioners are satisfied that every point can be answered at the proper time and feel that review on the merits should not be denied merely because respondents take issue with them on what the record shows as to the real points involved.

The brief in opposition is almost entirely devoted to the procedural question of the issues below and makes little or no attempt to meet Petitioner's claim that there was a denial of full faith and credit to the laws of Delaware. It sets out three questions, the first and third of which involve what is claimed to have been in issue and voluntarily litigated, and the second of which involves the power of the courts of Iowa to cancel shares of stock of a foreign corporation. The second question, as stated, is based upon at least one utterly false premise, viz, that the stock was issued in violation of the laws of Iowa. If this had been the case there would have been no Petition for Certiorari. Our case is bottomed upon the fact that the undisputed evidence showed, and both the trial court and the Supreme Court of Iowa found, that the common stock issued to the Bechtels was not issued or held in violation of any provision of the Iowa statutes.

The trial court definitely and specifically found that the defendant corporation had not violated the provisions of Chapter 387, except in one respect, which was in failing to report to the Secretary of State certain issuances of *preferred* stock after August 2, 1929. (Concl. of Law, Rec. p. 348,

loc. cit. 349, 350). It found, and the uncontradicted evidence showed, that every share of common stock originally issued to the Bechtels was issued in full compliance with the laws of Iowa and duly reported to the Secretary of State (Findings of Fact m, n, o, Rec. p. 335). It found that on the eve of the reclassification the 100,000 shares of old common stock were valid outstanding shares representing $1,000,000.00 or substantially 11% of the capital of the corporation (Finding of Fact u-l, Rec. p. 340). This being true, it is idle to talk about the power of an Iowa court of equity to cancel shares issued in violation of the Iowa Statutes.

The same question in Respondent's brief, assumes the new common stock to have been *fraudulently* issued and in Point Three (Brief in Opp. p. 17) they seek to justify the failure to restore the *status quo* on the theory that the old common stock was property used to perpetrate a fraud. The pleadings are entirely devoid of any allegations of fraud. We believe that if they are gone over line by line it will be found that the word fraud does not even appear in them. There is no charge of misrepresentation, and any conceivable claim of fraud in the reclassification must, in any event, be limited to constructive fraud, which never calls for the application of the rule contended for by Respondents.

The paragraph of plaintiff's petition referring to the reclassification plan and the invalidity of the old common stock is par. 49 appearing in the Record at page 191. An examination of it will disclose that it does not charge any actual fraud. It alleges that the directors knew that the 100,000 shares of common stock was worthless, and that the corporation had never received anything of value for it. The latter allegation is specifically refuted by the finding that it had been issued for property duly appraised by the Iowa Executive Council (Finding of Fact n, Rec. p. 335).

The authorities cited by Respondents to justify failure to restore the *status quo* will be discussed later in connection with their Point Three.

REPLY TO POINT ONE.

Point One of the Brief in Opposition purports to answer Petitioner's Point 1 and in it Respondents urge the direct opposite of Petitioner's contention by insisting that the decisions below did not go beyond the issues pleaded or voluntarily litigated. Several things urged in it should be commented upon.

First, it appears to be contended that Section 8438 authorizing a suit in equity on behalf of the State confers unlimited powers upon Iowa courts of equity to determine controversies affecting the rights of stockholders. A reading of the statute makes it perfectly clear that the action on behalf of the State must be predicated upon violations of the provisions of Chapter 387 and that it does not purport to confer any authority or jurisdiction to pass upon the validity of stock not issued or held in violation of the provisions of that chapter. A cause of action in equity under that section is the cause of action of the State and not the cause of action of a stockholder or class of stockholders against other stockholders to determine their relative rights.

Respondents say there is no question about the Bechtels holding the new common stock in violation of the provisions of the statute, but the trial court held there had been no violations of the statute and its decree invalidating the shares was predicated upon a finding that the original shares, while valid, had become worthless. If Respondents mean to claim that the new common derived by the Bechtels was void under Chapter 387 because not authorized by the Executive Council a complete answer would seem to be that this was equally true as to all of the

new common derived from the old preferred. None of it was submitted to the Executive Council and if that rendered it void there was no basis for discriminating between the shares received by Petitioners and those received by the other stockholders.

Second, Respondents refer to the Iowa Rules of Civil Procedure relating to joinder of parties and causes of action which they say repealed the prior statutes on the subject, and apparently claim that as these rules went into effect before the trial was commenced, it was proper for the intervening stockholders to join their cause of action based upon unfairness of the plan of reclassification with that of the State for violations of Chapter 387. There are two fallacies in this argument. The first and most obvious is that the question is not what they might have done, but what they did do. The second is that the action was commenced in 1939, three years or more before the rules of civil procedure became effective and the intervenor's pleading, the resistance thereto and their disclaimer of any intention to assert any independent cause of action were all filed before the effective date of the rules. (Rec. pp. 202, 206, 211).

Petitioners referred to the element of misjoinder purely as one argument in support of their contention that the "intervening answer" did not in fact raise an issue as to the validity of their shares, apart from the claim that they had been issued and held in violation of Chapter 387. The fundamental point was that the pleadings tendered no such issue. To support this contention we urged a) that such an interpretation would have resulted in an improper joinder of parties plaintiff and causes of action; and b) that when that point was raised by motion attacking the intervening answer, the intervenor's formally disclaimed any intention to assert any separate cause of action.

When the motion to strike the intervening answer for

misjoinder of parties and causes of action was made in 1940, and when intervenor's resistance was filed January 19, 1943 and when the motion was overruled Jan. 27, 1943 the right of different parties to assert independent causes of action was governed by Code Sections 10960, 10969 and 11130. After July 4, 1943 when these sections were superseded by the Rules of Civil Procedure no change was made in the pleadings of the intervenors, nor did they in any manner thereafter assert that they were now endeavoring to change the interpretation of their pleading and to assert a distinct cause of action.

It is true that the Rules of Civil Procedure were to govern future proceedings in actions commenced before their effective date unless in the opinion of the trial court their application would not be feasible. (Rule 1(b), Iowa Rules of Civil Procedure). However, this provision cannot have the effect of working a change in the issues merely because after the rules became effective such issues might have been permissible.

Again, we repeat, the question is whether intervenors did plead, or they and the present Petitioners did voluntarily litigate, any claim that in the absence of any violations of Chapter 387, the new common stock derived from the old common was void as between stockholders. The fact that the joinder of such a cause of action with that of the State would have constituted a misjoinder and would not have been proper under the then controlling statutes afforded a cogent reason for concluding that no such cause of action was being asserted. Still more cogent is the fact that when the corporate defendant charged that the "intervening answer" gave rise to such a misjoinder the intervenors disclaimed any such purpose and by their own interpretation limited their claim to joining with the plaintiff for relief authorized only under Chapter 387.

The Wisconsin case of *Luther v. C. J. Luther Co.* was

not cited as controlling on the interpretation of the Iowa Rules of Procedure, but because it illustrates first, the situation regarding misjoinder as it existed under the Iowa statutes in force when this pleading was filed and interpreted, and, second, the situation regarding voluntary litigation.

Respondents say that the intervenors did not disclaim any of their rights, but prayed that all illegally issued stock be decreed void. Petitioners are not claiming any waiver of any rights intervenors might have had, but do contend that they disclaimed any intention to assert them in this action. The nature of their disclaimer is set forth in detail in Division I of the original argument of the Bechtels as appellants (Rec. pp. 418-421). It is absolutely unequivocal. They followed that disclaimer with a failure to appear at the trial either in person or by counsel. They offered no evidence and they were entitled to no decree that any shares were invalid unless the State had been able to establish that they were issued or held in violation of the provisions of Chapter 387.

REPLY TO POINT TWO.

This is asserted to be in answer to Point 1 of Petitioner's brief, but it actually evades the point by injecting the claim that the shares declared void were issued in violation of the laws of Iowa, which the findings of the court expressly negative, and claims of constructive fraud and want of consideration which certainly were not in issue. In arguing this Point Respondents make their only reference to the laws of Delaware.

As we said at the outset, the Petition for Certiorari does not present any question of the power of an Iowa court of equity to cancel stock issued in violation of the laws of Iowa. The question is as to its power, under the issues joined before it, to review the fairness of a reclassification

of the shares of a Delaware corporation and to cancel shares into which admittedly valid shares were transmuted, merely because of a capital impairment.

We need not repeat that the trial court found no violation of the Iowa statutes in the issuance of the common stock so its decree invalidating the shares into which Petitioners' common stock was transmuted, was based, not upon any ascertained violation of the statutes of Iowa, but upon principles of equity generally, and its conclusion that the plan was unfair to the old preferred shareholders because it permitted common stock over which their shares had priority on liquidation, to participate.

There was no issue of fraud, either actual or constructive, before the court. In the case at bar no allegation was made of any misrepresentation by the common stockholder in procuring the adoption of the plan. This and other elements of a stockholders' derivative suit were the subject of another action to which the trial court made frequent reference. For example, during the proceedings in connection with the production of books and papers the Court made the following statement:

> "THE COURT: A question of information, the court can't be entirely ignorant of what is going. I noticed in the D. Moines Register Sunday, I bring it up because it is important, there is another suit filed by the same counsel apparently involving receivership and a good many questions that are in this case, and I bring it up frankly because I saw it, and I am wondering if that suit displaces this, or whether we are going to go on with this suit, as a matter of fact has another suit been filed, who filed it, what is involved, because I want to find out where I am going, what issues are involved in that suit and what in this, whether you are trying to get information in this suit to help this suit out." (Trans. on Applic. for Production p. 95)

"MR. ONTJES: This is not information for that lawsuit, this lawsuit as it now stands, as it now stands, the rule of the court has been here, the matter of whether or not these officers took the money from the stockholders of course is going to be presented to the court sometime; now those things as I understand the court's prior ruling to which we did take exception, the court ruled against the matters of evidence relating to the fraud as we say they perpetrated on the stockholders.

"THE COURT: I think the record would show that you filed an amendment setting up those issues, and then voluntarily withdrew it, and after you withdrew it said those issues were no longer in the case, now I think that is it, we can't go outside for something that Mr. Ontjes wants to prove about this million nine hundred thousand, I will sustain the objection in this case it is not an equitable proceeding, if you want to make some offer, this is a return as to why he did not produce some papers. Plaintiff excepts." (Trans. on Applic. for Prod. p. 96).

At page 121 of the Transcript of proceedings on the application for production it is shown that the Court asked for and examined the files in the stockholders' derivative suit to see what issues were involved in it. At pages 134 to 142 of the same transcript the position of counsel for the defendants that no question of the right of George M. Bechtel as an officer and director to deal with the corporation was in issue, is discussed and acquiesced in by the court.

At the conclusion of arguments as to the materiality of certain records demanded the Court said:

"I don't think there is any fiduciary relation existing between George M. Bechtel and the State of Iowa * * * it has been my view right along that certain things that the stockholder can raise, where the duty goes to him as a fiduciary capacity, that the State cannot raise. There is another case pending here, being case No.

23507, *Des Moines Bank & Trust Co. vs. George M. Bechtel,* which is marked Exhibit 'A' on May 18, 1943, that the issues of violating the fiduciary capacity are being raised against the Bechtels in a derivative stockholder suit. I say this kindly, without any rancor, that counsel with zeal which I maybe would have used myself if I had been in their position, haven't always kept clear the issues in this case and the other case, and time and again there has been an attitude evidenced to get into evidence in this case that which to my mind is useful only in the other case, but counsel in their zeal are forgiven for that". (Trans. on Applic. for Prod., pp. 239-240).

From the foregoing it is quite clear that all questions of constructive fraud were involved in the stockholders' derivative suit and not in the case at bar. The record in this case is utterly silent as to negotiations which led to the approval of the plan for reclassification by the board of directors and its submission to the stockholders. At that time the preferred stockholders were represented on the board by four of the six members. The common stock was owned by Martha R. Bechtel. She was neither an officer nor a director. She was represented on the board by her husband George M. Bechtel and her son Harold R. Bechtel. There was no allegation and no evidence that there was any breach of duty by the directors. Furthermore the rule for which Respondents cite numerous cases at page 27 of their brief does not apply to such a situation. In negotiations for a voluntary reorganization every stockholder, whether he be a director or not is entitled to look after his own interest and to make the best bargain possible. Constructive fraud, such as would permit the corporation to rescind a transaction by which a director reaped a personal profit would not sustain a finding of fraud which would vitiate a plan of reclassification of shares submitted to and adopted by a majority of all classes of stock affected

by it. Much less would it justify the cancellation of shares received by one class of stockholders without restoring them to their former position and status. Nothing short of actual fraud in procuring the adoption of the plan could justify that.

The argument of want of consideration and that in which it is contended that the new common shares received by Martha R. Bechtel under the plan were void under the laws of Delaware are entirely inapplicable. The nature and legal effect of such reclassifications under Sec. 26 of the General Corporation Law of Delaware have already been pointed out. No question of consideration is involved. The corporation received the consideration when it issued the original shares. In this case it had, according to the trial court's findings, received money or property for every share of its original common and preferred stock. It had received for the Bechtel shares a million dollars in property appraised by the Iowa Executive Council. When this stock was converted or transmuted into the new common shares there was no occasion for any consideration moving to the corporation.

The cases cited by Respondents to support their contention that the new Bechtel shares were issued in violation of the constitution and laws of Delaware are not in point. They were not cases of reclassification of existing shares for which payment had theretofore been received but involved the original issuance of shares for which no payment was made, or for which worthless shares of another corporation were taken in payment.

When shares have been issued for adequate consideration they are capable of reclassification and conversion into shares with different characteristics without further payment of any kind. The question of value is purely one for determination by the stockholders affected by the plan. Where they choose to permit participation on the part of

holders whose shares are inferior to theirs there is no want of consideration. The plan, to be made effective, required a favorable vote of the common as well as the preferred stockholders. If consideration is involved at all it is found in the favorable votes which were necessary to permit the change.

REPLY TO POINT THREE.

This point is Respondent's only attempt to justify the lower court's holding that the new common stock derived from the old common under the plan of reclassification should be cancelled and that the holder should not be reinstated as a holder of the original common stock. Their theory is that this course was justified because the old stock was used as an instrument to perpetrate a fraud on the preferred stockholders. They cite two cases as sustaining their proposition of law. These are definitely not in point.

In the case of *Weir v. Day*, 57 Iowa 84, 10 N. W. 304 the plaintiff sought recovery of property which he had conveyed to the defendant for the purpose of defrauding his creditors. It was held that he was not entitled to recover it. This is not authority justifying a refusal to restore the *status quo* when partially setting aside a reclassification believed to have been unfair to one class of stockholders.

The case of *First Trust & Savings Bank v. Iowa Wisconsin Bridge Company* is not at all similar to the case at bar. The master and the district court found that the mortgage sought to be foreclosed was procured by fraud, in that certain of the obligations for which it was given had never actually existed. The Circuit Court of Appeals says (on page 424 of the N. W. opinion):

> "The Court found that Thompson deliberately planned to defraud the bridge company".

Also, in sustaining the district court in its refusal to require the bridge company to return shares of stock surrendered in exchange for bonds held invalid, the Court of Appeals pointed out that the action was not one for rescission on the ground of fraud, but was an action for affirmative equitable relief in which the fraud was pleaded only as a defense. (N. W. Rep. p. 428). It then says:

> "Where the defrauded party is suing to rescind he must do equity by restoring whatever he received from the wrongdoer, but when the wrongdoer as plaintiff is attempting to enforce the tainted contract he is turned out of court empty handed".

Any relief against the reclassification plan which the intervenors as stockholders might have been seeking in the case at bar is governed by the principles applicable to rescission. The Bechtels were not seeking affirmative relief to which a defense of fraud was interposed. If alleged unfairness of the reclassification plan was in the case at all it must have been asserted by the intervenors as a basis for finding the plan inoperative and cancelling its fruits in the hands of the Bechtels. This can only be done with a restoration of the *status quo* and the Iowa-Wisconsin Bridge case is not authority for the contrary.

REPLY TO POINT FOUR.

Respondents answer our contention that the laws of Delaware governed the reclassification of the shares of the corporate defendant with the contention that by applying for a permit to do business in Iowa as a foreign corporation the Iowa Southern Utilities Company of Delaware subjected itself to the laws of Iowa and that those laws controlled the reclassification.

It is not necessary for the purposes of this case to pursue this argument to its logical conclusion, which would be

violative of every principle of law governing corporations. This is unnecessary because, as heretofore pointed out, the laws of Iowa did not even purport to prohibit foreign corporations doing business in the state from making changes in their capital structure in accordance with their charters and the laws of the state of their incorporation.

Chapter 387 makes applicable to foreign corporations licensed to do business in Iowa certain sections applicable to domestic corporations in connection with the sale and issuance of their stock. For example, Sec. 8412 prohibits the issue of stock until the corporation has received the par value thereof. Sec. 8413 provides that "if it is proposed to pay for capital stock in property or any other thing than money" the corporation must apply to the executive council for leave to issue it for such consideration. The pleadings in this case charged that much of the stock, both common and preferred, was issued without payment of the full par value and that some of it was issued for property without executive council authorization. These allegations were the real gist of plaintiff's action and constituted the reason for the contention of the relator that the common and much of the preferred stock was void, in which the intervenors joined. The defendants, both corporate and individual, denied these allegations and most of the voluminous record was made in tracing out the details in connection with the issuance of each of the 90,000 shares of stock.

If plaintiff had succeeded in showing that the old common stock had not been properly paid for and the decree invalidating it had been based upon that violation of the Iowa Statutes, the question of the applicability of these Iowa statutes to foreign corporations would have been material. However, no such question is involved at present because the evidence established that every share of common and preferred stock issued by the Iowa Southern Utilities Com-

pany of Delaware was fully paid for in money or in property approved by the Executive Council. The Court so found (Findings d, Rec. p. 330; e, Rec. p. 331; f, Rec. p. 332; Concls. A and B, Rec. p. 348) and this renders any consideration of the matters argued in Point Four, immaterial.

Whether it could lawfully be required to do so or not, the Iowa Southern Utilities Company of Delaware did comply with the Iowa statutes in issuing its stock. Starting in 1923 when it first procured its permit to do business in Iowa as a foreign corporation, it applied to the Iowa Executive Council for authority to issue its common stock for property. (Finding d, Rec. p. 330). This and a subsequent application were granted and every share of the original common stock of which Martha R. Bechtel was the owner at the time of the reclassification had been issued in strict compliance with the statutes and laws of the State of Iowa. This being true, the question narrows down to whether the validity and effect of a reclassification of stock of a foreign corporation, authorized by its charter and the laws of the State under which it was created, is to be determined by the law of the domicilliary state. Stated, otherwise, the question is whether changes in the capital structure of a foreign corporation, which do not in any way violate any applicable provisions of the statutes of a state in which the corporation does business, are controlled by the charter and the laws of the state which created it, and whether those laws are entitled to full faith and credit under the Constitution.

REPLY TO POINT FIVE.

Point Five is closely related to Point Four, just discussed. Respondents' argument is that full faith and credit was not required to be given to the charter and Sec. 26 of the General Corporation Law of Delaware because the corporate defendant is not a citizen entitled to the benefit of the due

process clause, and because Iowa was not required to admit it to do business in the state. This begs the real question entirely. Whether it had the power to do so or not, the State of Iowa did not exclude the defendant corporation from the state. Neither did it impose any condition that it waive the right given by Section 26 of the General Corporation Law of Delaware to reclassify its shares. Any conditions imposed by the statutes of Iowa were fully complied with when it issued its stock. The reclassification was not prohibited by the laws of Iowa. Its legal effect as a transmutation of the shares was controlled by the Delaware Law. Iowa could not refuse to recognize the validity of the change. At most it could have revoked the permit to do business in the state, which the Court refused to do.

The question of due process does not involve the corporation but is asserted on behalf of the Petitioners who are citizens and entitled to the protection of that clause whether the corporation is or not.

REPLY TO POINT SIX.

So far as the argument of this point relates to whether the relative rights of stockholders were in issue or voluntarily litigated, the matter has been covered earlier. It has been shown that the trial court and the parties all proceeded throughout the trial on the theory that the only issues were whether there had been violations of the provisions of Chapter 387.

The essence of Petitioners' claim that they were denied due process and a fair opportunity to defend is that the court decided against them on an issue that was not in the case and was not voluntarily litigated and that it did so after repeatedly stating that that issue was involved in another action and not in this, and after the Intervenors had expressly denied that such issue was raised by them.

Respondents now contend that because two days elapsed

between the court's oral announcement and the filing of its findings of fact, conclusion of law and decree, the present Petitioners had full opportunity to defend on the issue. It is submitted that if the matter was not in issue or voluntarily litigated it was not incumbent upon the individual defendants to ask to reopen the case and litigate such issue. They had a perfect right to proceed by way of appeal and it is to be noted that the Supreme Court of Iowa did not purport to affirm because of any failure to ask a retrial.

They next contend that during the 30 days which elapsed before the appeal was perfected the individual defendants did not make any motion to set aside or modify any of the court's findings. This Court will not fail to note that in its formal findings the trial court did not include everything mentioned in the oral pronouncement. It is elementary that oral statements by the court form no part of the decision. The only formal finding of fact to support the conclusion that the new common stock derived by the Bechtels was void are the findings (aa Rec. p. 346, l. 30, and Finding v, Rec. p. 343) that the old common was worthless at the time of the reclassification, and that the plan was therefore inequitable. Being satisfied that such a finding could not, as a matter of law, sustain a decree of invalidity, the holders were not required to ask to set it aside.

The case cited by Respondents as to what is due process in the construction of state laws binding upon the parties, are not in point. The gist of Petitioners' claim in this respect is that courts of a state cannot declare black to be white, and while, this court cannot be called on to correct mere errors in the course of litigation in the state courts, it can protect a litigant against the loss of his property without an opportunity to defend.

CONCLUSION.

As stated at the beginning of this Reply, Respondents' brief in opposition to the petition for the writ hardly touches the fundamental question regarding the applicability and controlling force of the laws of Delaware, or the rights of stockholders of a Delaware corporation to insist upon recognition of the contract created by the charter and the laws of that state.

It is respectfully submitted that the Petition and brief in support thereof disclose a proper case for review by this Court, and that the brief in opposition does not by any means dispose of the Constitutional questions raised.

WAYNE G. COOK,
Counsel for Petitioners.

COOK, BLAIR & BALLUFF,
Of Counsel.

SUBJECT INDEX.

Table of Cases Cited.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No.————.

GEORGE M. BECHTEL, Executor of the Will of
MARTHA R. BECHTEL, Deceased,
GEORGE M. BECHTEL and HAROLD R. BECHTEL,
Petitioners,

vs.

ILA FAY THATCHER, NANCY ROSSEAU, ELERY SCOTT and STATE OF IOWA, ex rel J. B. WEEDE,
Respondents.

BRIEF OF RESPONDENTS ILA FAY THATCHER, NANCY ROSSEAU, and ELERY SCOTT in Opposition.

OPINIONS BELOW.

The opinions of the Supreme Court of Iowa, 231 Iowa 784, 2 N.W. (2d.) 372. Supplemental Opinion on rehearing published 4 N.W. (2d.) 869. They appear in the record pages 85 to 167, inclusive.

Opinions of the Supreme Court of Iowa affirming the judgment of the trial court published in 31 N.W. (2d.) 853, but not yet appearing in the Iowa Reports. They are printed in the record, pages 482 to 523, inclusive.

JURISDICTION.

The oral opinion and findings of the District Court is set forth in the record pages 359 to 376, inclusive, and the written findings of fact, conclusions of law and decree are set forth in the record pages 328 to 351, inclusive. The opinion of the Supreme Court of Iowa was rendered on the 6th day of April 1948. Record p. 482 et seq. Petition for rehearing was denied November 19, 1948. Record p. 591. The jurisdiction of this Court is sought to be invoked under Paragraph (b) of Section 237 of the Judicial Code as amended, Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Whether a matter put in issue by the pleadings in accordance with the rules of practice of the State of Iowa and fully litigated by the parties and determined by the trial court and the Supreme Court of Iowa is due process within the meaning of the Fifth and Fourteenth Amendments of the Constitution of the United States.

2. May an Iowa Court of Equity cancel new par value stock fraudulently issued in exchange for old worthless common stock by a foreign corporation in violation of the Iowa Statutes and in violation of the rights of the preferred stockholders where the corporation has obtained a permit to do business in Iowa on the condition that it comply with the laws of the State of Iowa.

3. May a party join issue on a matter and fully litigate it in the trial court and for the first time on appeal claim that it was not in issue and then base a claim of want of due process thereon under the Federal Constitution without ever having claimed in the trial court that it was not in issue, although having had full opportunity to do so.

STATEMENT OF THE CASE.

The petitioners in their brief refer to the summary statement in their petition for writ of certiorari and then set forth an enlarged statement of facts. Both of said statements are saturated with statements not supported by the record to such an extent that the true character of the case before the trial court and before the Supreme Court of Iowa is not revealed.

Petitioners on page 2 of their brief assert: "The case as brought by plaintiff involved an entirely different cause of action than that which the trial court decided and the Supreme Court of Iowa affirmed against the petitioners." This statement is without foundation and contrary to the record.

Because of the inaccuracies and omissions in the statements submitted by petitioners it is necessary for these respondents to submit a brief statement of the case with proper record citations.

This is an action in equity commenced in November 1939 in the name of the State of Iowa on relation of J. B. Weede, a citizen of that state, under Chapter 387 of the 1935 Code of Iowa which authorized the Attorney General or a citizen to bring an action in the name of the State of Iowa against a foreign public utility corporation violating the Iowa statutes relating to the issuance of stock of such corporations operating in the state under a permit as a foreign corporation.

Said Chapter 387 of the 1935 Code is the same as Chapter 387 of Code of 1939, and said Chapter and other Sections of the Iowa Statutes made a part thereof are set forth in an Appendix attached to this brief. Said Chapter was adopted in 1913 and appears in the 1913 Iowa Code Supplement as Section 1641-q.

This action was brought against the Iowa Southern Utilities Company of Delaware and Martha R. Bechtel, and against George M. Bechtel, Harold R. Bechtel, Edward L. Shutts and H. W. Deininger officers of said Company, and against D. D. Bentzinger and Elery Scott and other stockholders, (R. pp. 1 to 5.)

Plaintiff's petition alleged that defendant corporation was organized under the laws of the State of Delaware with its principal place of business at Centerville, Iowa, and with all its property except some of its bank accounts located within the State of Iowa (R. p. 176, lines 27 to 32). This is admitted in defendant petitioners' answer (R. p. 254, lines 16 and 17).

The petition alleged that the defendant corporation made application to the State of Iowa for permit to transact business in the State of Iowa and that such permit was granted on the 26 day of March 1923, and by virtue of said application and the granting of said permit the Iowa Southern Utilities Company of Delaware has been subject to all the laws of the State of Iowa as provided in Chapter 387, and all other laws applicable to such foreign corporations since said time, and since said time the corporate defendant has continued to operate its business in the State of Iowa under and by virtue of the permit granted to it (R. p. 180, lines 24 to 34, p. 181, lines 1 to 7). The petitioners herein admitted in their answer all of these allegations except that they neither admit or deny the allegations which plead the Iowa Statutes or the effect thereof (R. p. 255, lines 8 to 17).

The petition alleged that the corporate defendant about March 16, 1923, made application for permit to do business in the State of Iowa as a non-resident corporation, and as a part of the application presented the following Resolution which was duly adopted by the directors of the corporation, which Resolution was as follows:

"RESOLVED, that a certified copy of the articles of incorporation of the company be filed with the Secretary of State of the State of Iowa, with a request that a certificate be issued authorizing this company to transact business in the State of Iowa, it being understood and hereby agreed that the certificate or permit, when issued, shall be subject to, and subject this company to, all the provisions of the statutes of Iowa relating to corporations for pecuniary profit."

which resolution was filed with the Secretary of State of the State of Iowa, and that thereunder and by virtue of the action of said corporation and the agreement made by said corporation, a permit to transact business in the State of Iowa was issued by the State of Iowa to said corporation (R. p. 181, lines 8 to 32). This was admitted by the petitioners herein in their answer (R. p. 255, lines 18 to 20).

The petition alleged violations of the provisions of Chapter 387 of the 1935 Code of Iowa and the issuance of stock for property in violation of the laws of Iowa without the approval of the Executive Council of the State of Iowa (R. p. 6, line 4 to p. 21, line 2); alleged corporate action of August 1, 1938 providing that each holder of 7% preferred stock would receive a dividend certificate of $32.08 and 4.2 shares of new common stock for each share of old stock held; the 6½% preferred stock—the holder to receive a dividend arrears certificate of $29.79 and 4.9 shares of new common stock for each share held; that the holders of the 6% preferred should receive an arrear certificate of $27.50 and 3.6 shares of the new common stock for each share of old stock held; each stockholder of common stock to receive 39458/100,000 shares of new common stock for each share of old common stock held which gave to the holders of old common stock 39458 shares of new common stock, par value $15.00 a share. (R. p. 18, lines 18 to 34, p. 19, lines 1 to 5, p. 20, lines 20 to 34, p. 21, lines 1 and 2).

Paragraph 49 of plaintiff's petition, which was adopted by the interveners, alleged:

> "That the exchange of the different classes of preferred stock for common stock and the exchange of the existing common stock for common stock on the basis herein set forth was all an arbitrary basis; * * * that said exchange value was fixed without reference to the legal rights of any of the stockholders; that at the time said basis of exchange was fixed, the officers and directors of said defendant corporation knew that * * * the 100,000 shares of common stock was worthless and without value." (R. p. 20, lines 1 to 28).

The corporate defendant filed motion to dismiss plaintiff's petition (R. p. 69).

On February 15, 1940, there was filed a petition of interveners, which is denominated "Intervening Answer of Ila Fay Thatcher and Nancy Rosseau," which adopted the allegations of plaintiff's petition and prayed that the stock held by them and all other stockholders similarly situated be decreed valid and that the stock illegally issued be canceled and have no voting rights, and asked for general equitable relief (R. p. 74, lines 9 to 34 and pp. 75 to 78, line 10). Amendment (R. p. 210, lines 7 to 31).

On March 18, 1940, the motion to dismiss was sustained (R. p. 78, lines 15 to 33 and p. 79, lines 1 to 10).

An appeal was taken to the Supreme Court of Iowa (R. p. 81, lines 6 to 34 and p. 82, lines 1 to 3). The Supreme Court of Iowa reversed the ruling of the trial court and remanded the case for trial on its merits. Opinions of the Court (R. pp. 85 to 167. Also reported 231 Iowa 784, 2 N.W. (2) 372). Court's order of remanding and issuance of procedendo (R. p. 168).

The intervening answer of Ila Fay Thatcher and Nancy Rosseau as amended adopts the allegations of plaintiff's petition as true (R. p. 210, lines 9 to 28).

Petitioners, on pages 3 and 4 of their brief, state that the corporate defendant moved to strike the intervening answer (R. p. 206, line 24 to p. 209, line 21), and interveners filed resistance thereto (R. p. 211 to p. 214, inc.), and that the trial court overruled the motion (R. p. 215, lines 1 to 24). That has nothing to do with the individual petitioners herein, they did not file any motion; one of their constitutional rights could have been invaded by that ruling.

The interveners in their resistance to the motion asserted that they were stockholders and should be permitted to protect their interests. They did not disclaim any relief that they might be entitled to (R. p. 212, lines 33 and 34; R. p. 213, lines 1 to 3, p. 214, lines 5 to 32). The prayer of their original intervening answer remained (R. p. 210, lines 27 and 28; R. p. 205, lines 30 to 35 and p. 206, lines 1 to 20). They prayed, among other things, that their stock and the stock of all others similarly situated be held valid, and that all stock illegally issued be decreed void and that no stock illegally issued have voting rights, and prayed for general equitable relief (R. p. 205, lines 30 to 35, p. 206, lines 1 to 20).

On February 13, 1943, the corporate defendant filed separate answer in which, among other things answering paragraph 46 of plaintiff's petition (R. p. 189, lines 33 to 34, p. 190, lines 1 to 8), stated it denied that plaintiff's conclusion that its common stock was void under the laws of Iowa. It denied that it represented in financial statements to its stockholders that 100,000 shares of common stock had a par value of $1,000,000 (R. p. 228, lines 30 to 34).

Answering paragraph 47 of plaintiff's petition (R. p. 18, lines 18 to 34, p. 49, lines 1 to 5, p. 190, lines 9 to 28), defendants admitted corporate action as alleged in said paragraph 47 (R. p. 229, lines 1 to 4, inc.).

Answering paragraph 49 of plaintiff's petition, above quoted in part, (R. p. 20, lines 1 to 28, p. 191, lines 24 to 34

and p. 192, lines 1 to 14) defendants denied that the alleged reclassification was on an arbitrary basis and without regard to the legal rights of the stockholders. It denied that the corporation had never received anything of value for the 100,000 shares of outstanding common stock. *It denied that said 100,000 shares of common stock was worthless and without value.* Defendant admitted that no authority of the Executive Council of the State of Iowa for the issuance of new common stock was sought or secured. It denied that the new common stock had been and was being issued in violation of the laws of Iowa (R. p. 230, lines 1 to 16).

On February 15, 1943, the defendants Martha R. Bechtel, George M. Bechtel and Harold R. Bechtel, petitioners herein, filed answer to plaintiff's petition and, among other things, answering said petition, alleged:

Answering paragraphs 3 to 11, denied that the stock held by them was pretended stock (R. p. 254, lines 18 to 27, p. 177, lines 5 to 34).

Answering paragraph 46 of the petition, defendants, petitioners, denied that the common stock of the defendant corporation was void under the laws of Iowa, and denied that said corporation represented in its financial statements to its stockholders that said 100,000 shares of common stock had a par value of $1,000,000 (R. p. 259, lines 12 to 18, p. 189, lines 33 to 34, p. 190, lines 1 to 8).

Answering paragraph 47, defendants admitted the corporate act alleged therein (R. p. 259, lines 19 to 24, p. 190, lines 9 to 28).

Answering paragraph 49 of the petition (R. p. 20, lines 1 to 28, p. 191, line 24 to p. 192, line 15), the defendants, petitioners *denied that the alleged reclassification was on an arbitrary basis and without regard to the legal rights of the stockholders;* they denied that any of the outstanding preferred stock had been issued without the full par

value having been paid therefor; they denied that the corporation had never received anything of value for the 100,000 shares of outstanding common stock; they *denied that said 100,000 shares of common stock was worthless and without value*, but averred that if this was so, the fact was wholly immaterial. The defendants admitted that no authority of the Executive Council of the State of Iowa for the issuance of the new common stock was sought or secured; denied that said new common stock had been issued and was being issued in violation of the laws of Iowa (R. p. 260, lines 21 to 24, p. 261, lines 1 to 3).

The Substituted Answer of Elery Scott, which was an Answer and Cross-Petition (R. p. 272, line 6 to p. 274, line 30), clearly alleges that the so-called new common stock in the amount of approximately $600,000.00 was issued for old common stock, which was absolutely worthless and without nominal or par value and which old stock was subservient to and inferior in all ways to the Preferred stock.

The cross-petitioner, Elery Scott, prays that the Court decree all illegally issued stock to be void ab initio and for general equitable relief (R. p. 274, lines 12-28).

The record shows affirmatively that the petitioners as well as the Utility Company specifically and definitely controverted the claim of respondents that the reclassification plan of August 1st, 1938, was illegal and unlawful, and that the Bechtels' stock of 100,000 shares was worthless at said time. The record shows that the question as to whether the 100,000 shares of Martha R. Bechtel were worthless on August 1st, 1938, was definitely in issue and affirmatively that much evidence was offered on that question. The Petitioners herein having joined issues on this matter and having introduced evidence, are not in position to urge that it was not an issue and not litigated. Opinion Supreme Court (R. p. 505, 31 N.W. (2) 853, at 863).

The entire minute records of the corporation and all resolutions relating to the recapitalization or alleged reclassification plan and scheme were offered in evidence (Exs. P1.1 to P1.8, off. tr. p. 143; Exs. P1.9 to P1.10, off. tr. p. 1629; Ex. P1.11, off. tr. p. 1629; Ex. P1.12, off. tr. p. 1594; particularly see P1.8, off. tr. p. 143, Ex. P1.9, off. tr. p. 1629. And also particularly see minute book, Ex. P1.7, pp. 83-84, off. tr. p. 143. Also see minute book, Ex. P1.8, pp. 92-93, off. tr. p. 143.) The circular letter of the plan, dated June 28, 1938, sent to the stockholders (Ex. P 45, off. tr. p. 166) and other letters sent out to the stockholders in connection therewith were offered in evidence (Ex. P 40, off. Tr. p. 166; Ex. P 39, off. tr. p. 166; Ex. P 41, off. tr. p. 166). The financial statements of the defendant corporation, bearing upon the worthlessness of the old common stock, were offered in evidence (Ex. D210 and D211, off. tr. p. 2247). Petitioners' counsel offered in evidence defendants' Exhibits D210 and D211 (Tr. p. 2244).

Respondents offered much evidence on the question of the worthlessness of the old common stock including long examination of accountant, respondents' witness Nussbaum (Trans. Vol. 1, pp. 182 to 222; 223 to 456; 507 to 750; Vol. 2, pp. 751 to 843; 899 to 956; 1054-1055; 1358 to 1389; 1444 to 1456; Vol. 4, pp. 2811 to 2820; 2830 to 2834).

Petitioners' counsel, Mr. Wayne G. Cook, examined at length Edward L. Shutts and V. D. Welch as to the condition of the company and considerations for the stock, and with respect to the alleged reclassification plan and exchange of old common stock for new common stock (Trans. Vol. 3, Testimony of V. D. Welch, pp. 1658 to 1796; 1874 to 2052; 2120 to 2175; Vol. 4, pp. 2176 to 2199; 2229 to 2286; 2591 to 2604. Testimony of Edward L. Shutts, Vol. 3, pp. 1636 to 1645).

The minutes of the directors' meeting which contained the report of Mr. E. F. Bulmahn, referred to and quoted

from in the Court's opinion 31 N.W. 853 at 864, were offered in evidence on the question of the worthlessness of the old common stock and were received without objection. (Ex. P17.1-Minute book, pp. 79-86 and particularly pp. 83-84). Mr. George M. Bechtel was chairman of that meeting and Mr. H. R. Bechtel secretary, and Mr. Bulmahn, then president and treasurer of the company, held one qualifying share (Ex. P1.1 - Minute book, pp. 148-149) which he received from the Bechtels, and what occurred at that meeting is clear proof that the old common stock was wholly worthless.

Petitioners' assertion on page 4 of their brief that neither the interveners nor their counsel appeared at the trial and no evidence was offered in their behalf, is not sustaind by the record. At the afternoon September 1, 1943 Session of the trial the Court said:

"I assume that in the case like those represented by Lane & Waterman and by Clark, Pryor & Hale firm, that we will take their—it is a form of default not to be here seven days, consider they are not in default.

"Mr. Havner: Yes, that is all right.

"The Court: What I had in mind that technically they are in default, it is a form of default not to appear at the trial, they are not to be considered in default any more than the clients represented by Lane & Waterman, if they are needed here at the trial.

"Mr. Havner: That is all right with us your Honor." (Tr., Vol. 1, pp. 41 and 42.)

No response was made by petitioners' counsel to the Court's statements, but they made no objection and acquiesced therein. Clark, Pryor & Hale appeared for interveners but under the record didn't need to be there all the time. The respondent-cross-petitioner Elery Scott appeared pro se at the trial (Tr. p. 2).

It is not necessary for a party to establish all the allega-

tions of his pleading by his own evidence if the evidence in the case sustains the pleadings, it makes no difference by whom it was offered. Quite a number of the small stockholders similarly situated to the interveners and cross-petitioner Elery Scott testified (Court's statement, Tr., Vol. 4, bottom p. 2862).

The trial commenced on the First day of September 1943 and at the afternoon session of the Court, petitioners' counsel being present, counsel for plaintiff called attention to Paragraph 49 of plaintiff's petition (R. p. 20, lines 1 to 28, p. 191, lines 24 to 34 and p. 192, lines 1 to 14) and stated that the petition alleged that the exchange value of the stock was fixed without reference to the legal rights of any of the stockholders, and that at the time said basis of exchange was fixed, the officers and directors of said defendant corporation knew that a large part of the preferred stock had been issued without the full par value having been paid therefor, and knew that the 100,000 shares of common stock was worthless and without value (Tr., Vol. 1, p. 42).

The petitioners' assertion, bottom page 4 of their brief, that the trial court limited the issues is not sustained by the record. Judge Graven's oral findings in which the various issues and evidence introduced are discussed show clearly what Judge Graven considered to be the issues and what was involved in the case tried and determined. (Tr., Vol. 4, pp. 2861 to p. 2863; which also appears, R. p. 359 to p. 376, inc.)

The trial in the District Court commenced on the 1st day of September 1943. The evidence closed on the 18th day of December 1943 (R. p. 359).

Argument of counsel for plaintiff began December 23, 1943 and continued through December 29, 1943 (R. p. 359).

Argument of counsel for defendant corporation began and closed on December 30, 1943 (R. p. 359).

Argument of Mr. Cook, counsel for petitioners, began on January 6, 1944 and closed on January 10, 1944 (R. p. 359).

Reply arguments of counsel for plaintiff occupied January 11 and 12, 1944 (R. p. 359).

Further arguments by Mr. Cook, Mr. Havner and Mr. Ontjes were made at the morning session January 13, 1944, and Court adjourned until January 19, 1944 (R. p. 359).

On January 19, 1944 the Court made his oral findings (R. p. 359 to p. 376).

In these oral findings, among other things, the Court said:

> "Now just prior to the meeting, they had eight million dollars worth of stock, preferred stock outstanding, which was entitled to full preference ahead of the common stock; they had around two million back dividends outstanding, which was ahead of the common stock, and yet in the meeting of August 1st, 1938, the assets of the company were not sufficient to pay much more than half of the preferred stock, so this common stock belonging to Bechtels was absolutely worthless, yet in the re-classification meeting of August 1st, 1938, this worthless common stock was changed over so that on the first of August, 1938, the Bechtels, instead of having one hundred thousand shares of no par common stock, absolutely worthless, they own six hundred thousand dollars of new common stock, fifteen dollars par value, on a par with the old preferred. In other words I regard that as taking six hundred thousand dollars out of the pockets of these preferred stockholders. They are given thirty nine thousand shares, and they are put on a par with the preferred stockholders. Now that transaction of August 1st, 1938, so far as the Bechtels are concerned, must meet my condemnation. Now there has been some question raised by counsel whether we can do anything about that stock. I will say that I am going to try to do something about it. Now this is a court of equity and we have jurisdiction of a cor-

poration, jurisdiction of the Bechtels, we have the intervenor stockholders in here; we have a gross wrong perpetrated upon the preferred stockholders, and I don't believe—it has been suggested the only place you can do anything about it is down in Delaware; I don't believe these four thousand people have to go to Delaware. The Supreme Court say in its prior opinion to all effects this was a domestic corporation, while it is foreign. We have an intervenor stockholder here; true the plaintiff is not a stockholder, so far as that is concerned, but there are intervenors here and I think they have a right to protest here against this six hundred thousand dollar stock issue to Bechtels, and they don't have to go down to Delaware to do it; that is one theory that they have that right. There is two theories, the first that it should have been submitted to the Executive Council. Upon argument it is claimed this is reclassification, not exchange. I am inclined to the view that these re-classifications should be submitted to the Executive Council. What happened in this case shows the need of it. There is more need to submit it, any reclassification, where it is involuntary than it is in a voluntary case; I am inclined to think that it should have been submitted to the Executive Council." * * * (R. p. 371, bottom 9 lines, and p. 372 and p. 373, top 6 lines).

"It is my finding that I cannot reinstate the Bechtels for their old no par stock; in this case they attempted, I feel, to take advantage of the preferred stockholders; the thing has not worked out so far, but I am declaring that invalid, I am not going to reinstate them because, as we say in the law, I regard them as parties to something that is particeps criminus; so that the capitalization of the company will be reduced by the amount of the Bechtel stock." * * * (R. p. 374, line 11 to line 19, Inc.)

"Now, there is another theory that is argued I think most strongly by Mr. Ontjes and that was that even under Chapter 387 the stock is invalid, because there was no consideration for the stock, the stock was worth-

less; some authorities from Delaware lend strength to that view. So I say on the cancelling of the Bechtel stock there is about three different theories on which it is done." (R. p. 375, line 11 to line 19, Inc.)

The petitioners did not make any claims in the trial court that the findings went beyond the issues in the case nor claim any surprise (Tr., Vol. 4, p. 2878).

The written findings and conclusions of the trial court were not made and filed until two days later, January 21, 1944 (R. p. 328, lines 15 to 20).

The Court's written findings and conclusions of law, among other things, contained the following:

WRITTEN FINDINGS.

"V. The Court finds that the said re-classification as to the issuance of the 39,468 shares issued to Martha R. Bechtel, that the re-classification plan so far as it provided for and permitted the issuance of 39,468 shares to the said trustees of Martha R. Bechtel was unjust and unfair and inequitable as to the former preferred stockholders represented in this case by the intervenors, Ila Faye Thatcher and Nancy Rosseau. The corporation did not report to the Secretary of State of the State of Iowa under Section 8416, 1939 Code, the issuance of the certificates representing the new common stock in lieu of the certificates representing the old common and preferred stock. The corporation did not apply to the Executive Council of the State of Iowa under Section 8413-8415 Code of Iowa, 1939, for authority to issue certificates of new common stock in lieu of certificates representing the old common and preferred stock." (R. p. 343, lines 9-26.)

"z.aa. That on August 1, 1938, prior to the meeting for the re-classification of the stock, there was issued and outstanding 80,102 shares of cumulative preferred stock of the par value of $8,010,200.00. That there was due and unpaid accumulated dividends on the

same in the sum of $2,442,102.36. That this preferred stock under the articles of incorporation of the corporation had priority and preference to the full extent of its par value and accrued dividends thereon over the existing no-par common stock. That on August 1, 1938, prior to said re-classification, the net assets of the corporation were such as to lack several million dollars of being equal to the par value of the preferred stock and the accumulated dividends thereon. That the said no-par common stock immediately prior to said re-classification was wholly worthless. That under the re-classification plan there was issued in lieu of said no par common stock 39,468 shares of new common stock, with a par value of $15.00 per share, which except as to the matter of accrued dividends was placed on an equality with the shares of new common stock issued to the former preferred stockholders. That the no par common stock for which the new common stock was issued, was worthless, that there was no consideration for the issuance of the said 39,468 shares of new common stock." (R. p. 346, lines 8-33.)

CONCLUSIONS OF LAW.

"That the 39,468 shares of new common stock issued in lieu of the former no par value common stock, under the re-classification meeting are void and invalid." (R. p. 349, lines 22-25, Inc.)

"It is further adjudged and decreed that the 39,468 shares of new common stock into which the old common stock was transmuted is void and invalid, and shall not be recognized by the corporation as being stock of the corporation, and shall not be re-instated as to its former position, of no par common stock." (R. p. 350, lines 22 to 27, Inc.)

The contention (1) that the findings of fact and conclusions of law and decree cancelling petitioners' shares of stock was not responsive to any issue and deprived petitioners of their property without due process of law; and

(2) that the refusal to restore petitioners' to their former positions as holders of original common stock similarly deprived them, were never presented in the trial court although petitioners had ample opportunity to do so. They never claimed in the trial court that the findings of fact and conclusions of law and decree went beyond the issues, nor did they ask for any further hearing nor file any motion to set aside any part of such findings of fact, conclusions of law and decree.

PROPOSITIONS RELIED UPON FOR DENIAL OF WRIT.

POINT ONE. The findings of fact and conclusions of law of the trial court and of the Supreme Court of Iowa did not go beyond the issues raised and litigated in this case. That the so-called re-classification plan was unfair, illegal and fraudulent, and that the Bechtel stock of 100,000 of old common was worthless was directly in issue under both the pleadings and the evidence.

POINT TWO. The Iowa Courts did not err in holding and decreeing invalid the new common stock received by the Bechtels in exchange for their old worthless common stock. Under the laws and statutes of Iowa the courts had full power to declare the stock invalid and void issued by the corporation and received by the Bechtels in violation of the laws of the State of Iowa. The stock was issued to the Bechtels in fraud of the rights of the preferred stockholders and without consideration and the court of equity had full power to cancel it.

POINT THREE. Money or property used to perpetrate a fraud can not be recovered and the court was warranted in declaring void and canceling the new stock

which had been issued for the old worthless common stock without restoring the status quo ante. The new common stock, having been issued to the Bechtels in violation of Chapter 387 of the Code of Iowa which prohibited it and in violation of the public policy of the state and in fraud of the rights of the preferred stockholders, was properly canceled without restoring the status quo ante.

POINT FOUR. The defendant corporation having obtained a permit from the State of Iowa to transact business in the State of Iowa and agreed to be bound by the laws of the State of Iowa, and all of its business and property and books and records being located in the State of Iowa, and all of its officers and directors, save one, being residents of the State of Iowa, the Supreme Court of Iowa did not err in finding and holding that the so-called re-classification was not controlled or governed by the laws of Delaware and in so holding did not violate any constitutional rights of the petitioners.

POINT FIVE. The Supreme Court of Iowa did not err in holding that no right of petitioners under either the Constitution of the United States or the State of Iowa had been violated.

POINT SIX. There is no merit in the petitioners' contention that they were deprived of their property without due process of law in violation of Section 1 of Article IV. of the Constitution of the United States and of the Fifth and Fourteenth Amendments to the Constitution of the United States.

POINT ONE.

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE TRIAL COURT AND OF THE SUPREME COURT OF IOWA DID NOT GO BEYOND THE ISSUES RAISED AND LITIGATED IN THIS CASE. THAT THE SO-CALLED RE-CLASSIFICATION PLAN WAS UNFAIR, ILLEGAL AND FRAUDULENT, AND THAT THE BECHTEL STOCK OF 100,000 OF OLD COMMON WAS WORTHLESS WAS DIRECTLY IN ISSUE UNDER BOTH THE PLEADINGS AND THE EVIDENCE.

(Answer to Petitioners' Point 1, Brief pp. 6 to 8).

Chapter 387 of the 1939 Code of Iowa, Section 8438, grants broad and practically unlimited power to a court of equity to determine any controversy that arises under the Statute of the State of Iowa affecting the rights of any stockholder. It gives Courts of equity full power

> "to dissolve, close up or dispose, of any business or property owned, or operated, or controlled in violation of the provisions of this chapter; to dissolve any corporation owning or controlling the capital stock of any other corporation in violation of the provisions of this chapter and to close up or dispose of the business or property of the said corporation; and if the court finds that, in order to carry out the purposes of this chapter, it is necessary so to do, it may dissolve the corporation issuing the stock which is owned in violation of the provisions of this chapter, close up the business of said corporation and dispose of its property, and the court may appoint a receiver who shall be a resident of Iowa for any business or for any corporation which has violated the provisions thereof or of the corporation issuing the stock which is held in violation thereof."

If the Court has such power then in the exercise of that power it might do anything less than the exercise of the full extent of its power, and if the power given to the court could be invoked where any stock had been unlawfully issued, then certainly under the issues in this case the court had the right and the power and the authority to determine the rights of the stockholders. There are no sound procedural considerations forbidding joinder of suits and disposing of the entire matter under the record in this case. There is no question about the Bechtels holding the new common stock in violation of the provisions of the statute.

The assertion of petitioners, on page 7 of their brief, that there was no issue between the interveners and defendant stockholders regarding the fairness or equity of the re-classification, is not sustained by the record as has been pointed out in our statement of the case.

Iowa Code, 1939, Sections 10960, 10969 and 11130 were all repealed by the adoption of the new Iowa Rules of Civil Procedure prior to the trial of this case in the trial court. The new Rules of Civil Procedure went into effect July 4, 1943, and the trial of this cause was not commenced until September 1, 1943. (Tr. Vol. 1, p. 1) and was tried under the new rules. See Rules of Civil Procedure, Volume 2, Code of Iowa, 1946, page 2145.

Section 10960, Code of 1939, superseded by Rule 22. See page 2146, 1946 Iowa Code.

Section 10969, Code of 1939, superseded by Rule 23. See page 2146, 1946 Iowa Code.

Section 11130, Code of 1939, superseded by Rules 72, 73 and 104. See page 2152, 1946 Iowa Code.

The Iowa Rules of Civil Procedure provide:

"22. ACTIONS JOINED. A single plaintiff may join in the same petition as many causes of action,

legal or equitable, independent or alternative, as he may have against a single defendant."
See Iowa 1946 Code, Volume 2, page 2146.

"23. MULTIPLE PLAINTIFFS. Any number of persons who claim any relief, jointly, severally or alternatively, arising out of or respecting the same transaction, occurrence or series of transactions or occurrences, may join as plaintiffs in a single action, when it presents or involves any question of law or fact common to all of them. They may join any causes of action, legal or equitable, independent or alternative, held by any one or more of them which arise out of such transaction, occurrence or series, and which present or involve any common question of law or fact."
See Iowa 1946 Code, Volume 2, page 2146.

"24. PERMISSIVE JOINDER OF DEFENDANTS.
"(a) *Generally.* Any number of defendants may be joined in one action which asserts against them, jointly, severally or in the alternative, any right to relief in respect of, or arising out of the same transaction, occurrence, or series of transactions or occurrences, when any question of law or fact common to all of them is presented or involved."
See Iowa 1946 Code, Volume 2, page 2146.

"26. PARTIES PARTLY INTERESTED. A party need not be interested in obtaining or defending against all the relief demanded. Judgment may be given respecting one or more parties according to their respective rights or liabilities."
See Iowa 1946 Code, Volume 2, page 2147.

"27. REMEDY FOR MISJOINDER.
"(a) *Parties.* Misjoinder of parties is no ground for dismissal of the action, but parties may be dropped by order of the court on its own motion or that of any party at any stage of the action, on such terms as are just, or any claim against a party improperly joined may be severed and proceeded with separately."

"(b) *Actions.* The only remedy for improper joinder of actions shall be by motion. On such motion the court shall either order the causes docketed separately or strike those causes which should be stricken, always retaining at least one cause docketed in the original case. Before ruling on such motion, the party whose pleading is attacked may withdraw any of the causes claimed to be misjoined."
See Iowa 1946 Code, Volume 2, page 2147.

"67. TECHNICAL FORMS ABOLISHED. All common counts, general issues, demurrers, fictions and technical forms of action or pleading, are abolished. The form and sufficiency of all motions and pleadings shall be determined by these rules, construed and enforced to secure a just, speedy and inexpensive determination of all controversies on their merits."
See Iowa 1946 Code, Volume 2, page 2152.

"33. CROSS-PETITIONS.

"(a) *Against coparties.* A cross-petition may be filed by one party against a coparty, on a cause of action arising out of a transaction or occurrence which is the basis of the original action or any counterclaim therein. It may include the claim that such coparty is, or may be, liable to cross-petitioner for all or part of a claim asserted in the principal action against the cross-petitioner."
See Iowa 1946 Code, Volume 2, page 2147.

"75. INTERVENTIONS. Any person interested in the subject matter of the litigation, or the success of either party to the action, or against both parties, may intervene at any time before trial begins, by joining with plaintiff or defendant or claiming adversely to both."
See Iowa 1946 Code, Volume 2, page 2152.

"249. ISSUES TRIED BY CONSENT—AMENDMENT. In deciding motions under rule 243 or 244, the court shall treat issues actually tried by express or im-

plied consent of the parties but not embraced in the pleadings, as though they had been pleaded. Either party may then amend to conform his pleadings to such issues and the evidence upon them; but failure so to amend shall not affect the result of the trial."
See Iowa 1946 Code, Volume 2, page 2171.

No motion was ever made by the petitioners herein attacking the pleadings of the interveners or of Elery Scott.

It will be noted that Rule 27 of Iowa Rules of Civil Procedure provides that the only remedy for improper joinder of causes of action is by motion. The petitioners did not make or file any such motion in the trial court. The claim of misjoinder could not be asserted for the first time in the Supreme Court of Iowa, nor can it be urged as a basis for the claimed violation of a Constitutional right in this Court.

It will be noted that the substituted answer of Elery Scott (R. pp. 272 to 274) which was in effect a cross-petition was properly filed under Rule 33 of the Rules of Civil Procedure. This cross-petition also directly charged that the old common stock was utterly worthless and was subservient and inferior in all ways to the preferred stock and prayed that all illegally issued stock be decreed void and for general equitable relief (R. p. 273, lines 16 to 25).

It should be noted that Rule 75 of Iowa Rules of Civil Procedure on interventions provides that any person interested in the subject matter of the litigation may intervene.

The pleadings of the interveners adopted the plaintiff's petition and charged invalidity of the Bechtel stock. The interveners prayed that all invalid stock be cancelled and for general equitable relief (R. p. 74, line 9 to p. 78, line 10, p. 202, line 18 to p. 206, line 22). Amendment (R. p. 210, lines 7 to 31, and particularly R. p. 205, lines 30 to 35 and p. 206, lines 1 to 19).

The interveners did not disclaim any of their rights. They prayed that all illegally issued stock be decreed to be void, and prayed for general equitable relief (R. p. 206, lines 1 to 19). The fairness of the reclassification and the invalidity of petitioners' old common stock was directly in issue. It was charged that it was worthless. The intentional over valuation of property in exchange for stock is actual fraud.

Scully v. Automobile Finance Company (Del.), 49 Atl. 54;

Tucker v. National Sugar Refining Company (N. J.), 84 Atl. 10 at 15.

The interveners appeared by Clark, Pryor, Hale & Plock.

The case of *Luther v. J. C. Luther Co.*, 118 Wisc. 112, 94 N.W. 69, decided March 21, 1903, cited by petitioners on page 8 of their brief, has no application. The Iowa Rules of Civil Procedure are controlling and the decision of the Iowa Supreme Court construing the Iowa Statutes and Iowa Rules is controlling, and the very rules and the very statutes which are involved in this case and have been construed by the Iowa Supreme Court adverse to the petitioners' contention, and the decision of the Supreme Court of Iowa is controlling on the subject of the construction of the Iowa Statutes and of the Iowa Rules of Civil Procedure.

POINT TWO.

THE IOWA COURTS DID NOT ERR IN HOLDING AND DECREEING INVALID THE NEW COMMON STOCK RECEIVED BY THE BECHTELS IN EXCHANGE FOR THEIR OLD WORTHLESS COMMON STOCK. UNDER THE LAWS AND STATUTES OF IOWA THE COURTS HAD FULL POWER TO DECLARE THE STOCK INVALID AND VOID ISSUED BY THE CORPORATION AND RECEIVED BY THE BECHTELS IN VIOLATION OF THE LAWS OF THE STATE OF IOWA. THE STOCK WAS ISSUED TO THE BECHTELS IN FRAUD OF THE RIGHTS OF THE PREFERRED STOCKHOLDERS AND WITHOUT CONSIDERATION AND THE COURT OF EQUITY HAD FULL POWER TO CANCEL IT.

(Answer to Petitioners Point 2, Brief pp. 8 to 11).

1. The Courts under Chapter 387, Section 8438, of the Iowa Code had full power to cancel the new common stock that was issued in exchange for the Bechtels old worthless common stock. A Court of Equity has power to cancel stock illegally or fraudulently issued at a suit of a stockholder (18 C. J. Sec., Corporations Sec. 249).

Pontiac Packing Co. v. Hancock et al., 257 Mich. 45, 241 N.W. 268;

In 14 *Corpus Juris*, page 463, Section 658, it is stated:

> "Since the creation of invalid stock and the issue of certificates therefor is not only a wrong against the corporation but also creates a cloud upon the rights of other stockholders, a court of equity will remove the same by decreeing a cancellation thereof and a surrender of the certificates at the suit of a complaining stockholder, or of the corporation itself."

As to the power of a court of equity the language of the profound Jurist, Story, is particularly applicable to the

present situation. In *Story Equity*, 14th Edition, Volume 1, page 96, the author says:

> "Every just order or rule known to equity courts was born of some emergency, to meet some new conditions and was, therefore, in its time, without precedent. If based on sound principles, and beneficent results follow their enforcement, affording necessary relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constantly varying demands of equitable relief."

In *State ex rel Weede v. Bechtel et al.*, 31 N.W. (2) 853, the Iowa Supreme Court in speaking with reference to the various statutes in question and as to the power of a court of equity acting under and by virtue of said statutes and the general rules of equity, at 861-862 said:

> "Applying the above statement to the situation in the instant case the beneficent result afforded by the decree of Judge Graven was to restore to the preferred shares their rights as they existed prior to the plan adopted as of August, 1938. Further, it imposed no illegal burden upon the Bechtel stock. What Mrs. Bechtel had before that date was worthless. The decree added nothing to the burden of such old stock. No doubt the trial court had in mind that most wholesome equitable maxim, 'Equity suffers no wrong to be done without a remedy.' See Pomeroy's Equitable Jur., 5th Ed., Vol. 1, Section 35 et seq."

2. Directors are primarily trustees for the corporation and its stockholders, and their relation to the corporation is of such a fiduciary nature that in transactions with the corporation the burden is on them to show entire fairness and full adequacy of consideration.

Hoyt v. Hampe, 206 Iowa 206, 214 N.W. 718.

Geddes v. Anaconda Copper Mining Co., 254 U. S. 590, 41 S. Ct. 209.

Such transactions are presumptively fraudulent.

Corsicana Natl. Bank v. Johnson, 251 U. S. 68, 40 S. Ct. 82.

3. Directors cannot, either directly or indirectly, in their dealings on behalf of the corporation with others, or in any other transaction in which they are under a duty to guard the interests of the corporation, make any profit or acquire any personal benefit for themselves or for another corporation to the disadvantage of the corporation they control and are acting for.

Corsicana National Bank v. Johnson, 251 U. S. 68, 40 S. Ct. 82;

Jones v. Missouri Edison Elec. Co. (C. C. A. 8), 233 Fed. 49;

Heim v. Jacobs (8 C. C. A.), 1[illegible] Fed. (2d) 29;

Heffern, etc. v. Gauthier, 22 Ariz. 67, 193 Pac. 1021;

Hoyt v. Hampe, 206 Iowa 206, 214 N.W. 718;

Munson v. Syracuse G. C. R. Co., 103 N. Y. 58, 8 N. E. 355, 358;

Fitzgerald v. Fitzgerald and Mailory Con. Co., 44 Neb. 463, 62 N.W. 899;

Fletcher Cyc. Corporations (perm. Ed.) Vol. 3, p. 207, Sec. 844; p. 299, Sec. 937; pp. 307-311, Sec. 944;

Iroquois Iron Ore. Co. v. Kruse (8 C. C. A.), 241 Fed. 433, 441, 442;

Scully v. Automobile Finance Co. (Del.), 49 Atl. at 54;

Tucker v. National Sugar Refin. Co. (N. J.), 84 Atl. 10 at 15.

4. The issuance of new common stock in exchange the old common stock was in violation of the statutes laws of Iowa, and in fraud of the preferred stockhold and without consideration and void.

1939 *Code of Iowa*, Sections 8412 to 8416 and S tions 8420 to 8428, and Chapter 387.

In *First Trust and Savings Bank* (formerly Bechtel Tr Company) and *Phoenix Finance Corporation vs. Io Wisconsin Bridge Company, et al.*, 19 Fed. Sup. 127; affirm (8 C. C. A.) 98 Fed. (2) 416; certiorari denied 305 U. S. 6 rehearing denied 305 U. S. 676; wherein bonds had b fraudulently issued without proper consideration, bonds had been fraudulently issued in exchange for p ferred stock held by Phoenix Finance Corporation, Court cancelled the bonds. The Court in 19 Fed. Sup. said:

"Anticipating an adverse ruling, the petition alternatively pray for a modification of the decree w provisions commanding the re-issuing of certain sha of stock to Phoenix Finance Corporation, which it c celed when fraudulently obtaining the bonds. might conceive some invidious analogies to this sit tion. Having attempted the strong box of another, being hosit by what is now claimed to be a premat explosion, they volubly invoke the compassion of Court to restore valuable implements of their c left behind. I see no reason why a court of equ should be deeply concerned in giving an affirmat relief to the Phoenix Finance Corporation. On other hand I think the petitions for rehearing sho be denied and the motion to dismiss and vacate decree overruled, and it will be so Ordered."

While the Supreme Court of Iowa determined this m ter under the laws of Iowa and the statutes of Iowa, regardless of that fact the stock of the Bechtels is also al

lutely void and entitled to be canceled under the laws of the State of Delaware.

5. The issuance of new common stock in exchange for the Bechtel old worthless common stock was also in violation of the laws of Delaware.

The Constitution of Delaware provides: Article 9

> "Sec. 3. No corporation shall issue stock, except for money paid, labor done or personal property, or real estate, or leases thereof actually acquired by such corporation."

The conscious and intentional overvaluation of property in exchange for stock IS ACTUAL FRAUD. The issuance of new common stock for worthless old common stock was actual fraud.

> *Scully v. Automobile Finance Co.* (Del.), 49 Atl. at 54;
>
> *Tucker v. National Sugar Refining Co.* (N. J.), 84 Atl. 10 at 15;
>
> *In Sohland v. Baker* (Del. 1927), 141 Atl. 277, 58 A. L. R. 693, at 708 the Court said:

"Various bankers testified that the stock pledged had no collateral value in August of 1922.

"There is no evidence whatever that it had any market value at that time from which the Bankers' Mortgage Company could have hoped in any manner to realize anything from this stock and Sohland had no reasonable ground to believe that it could.

"The contentions of the appellants are almost entirely based on the uncorroborated testimony of Alfred Sohland, and our conclusion is that the Chancellor was correct in holding that the stock in question had no cash value when the stock of the Bankers' Mortgage Company was issued. The Foundry & Machine Works stock having no cash value there was no consideration

for the issuance of the Bankers' Mortgage Company stock to the Sohlands and there was no error in th court below in decreeing that such stock be cancele *Ellis v. Penn Beef Co.*, 9 Del. Ch. 213, 89 Atl. 666."

In *Lofland v. Cahall* (Del.), 118 Atl. 1, at page 5 th Court said:

"Our conclusion is, that the appellants, acting as d rectors, issued to themselves the ninety shares of stoc on September 19, 1911, not only without paying fo the same AS REQUIRED BY THE CONSTITUTIO but without any consideration at all. They parted wit nothing of value, paid nothing for the stock and ha no thought of paying for it. Their act was a pur gift from themselves as directors to themselves as in dividuals without the consent or knowledge of th other stockholders, and CONSTRUCTIVELY FRAUDU LENT."

Under the Constitution of Delaware stock can not b issued without proper consideration. The old Bechtel com mon stock was wholly worthless and did not constitute an consideration for the new common stock, as noted in th cases above cited. The Delaware Constitution is the su preme law of Delaware and the old worthless Bechtel com mon stock could not be exchanged for new par value stoc in violation of the Delaware Constitution under the guise o a so-called reclassification plan.

6. The Bechtels were directors and officers of th defendant corporation and in the exchange of the stoc were dealing with themselves in fraud of the preferre stockholders and under such a state of facts the burden on them to show full fairness and adequacy of consider tion, and in this the record shows they gave no consider tion.

In *Geddes v. Anaconda Copper Mining Co.*, 254 U. S. 590, 41 S. Ct. Rep. 209, at 212 it is stated:

> "The relation of directors to corporations is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation, and where the fairness of such transactions is challenged *the burden is upon those who would maintain them to show their entire fairness and where a sale is involved the full adequacy of the consideration. Especially is this true where a common director is dominating in influence or in character.* This court has been consistently emphatic in the application of this rule, which, it has declared, is founded in soundest morality, *and we now add in the soundest business policy. Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 588, 23 L. Ed. 328; *Thomas v. Brownsville, etc. R. R. Co.*, 109 U. S. 522, 3 Sup. Ct. 315, 27 L. Ed. 1018; *Wardell v. Railroad Co.*, 103 U. S. 651, 658, 26 L. Ed. 509; *Corsicana National Bank v. Johnson*, 251 U. S. 68, 90, 40 Sup. Ct. 82, 64 L. Ed. 141." (Italics supplied)

POINT THREE.

MONEY OR PROPERTY USED TO PERPETRATE FRAUD CAN NOT BE RECOVERED AND THE COU WAS WARRANTED IN DECLARING VOID AND CA CELING THE NEW STOCK WHICH HAD BEEN ISSU FOR THE OLD WORTHLESS COMMON STOCK WIT OUT RESTORING THE STATUS QUO ANTE. THE NE COMMON STOCK, HAVING BEEN ISSUED TO THE BEC TELS IN VIOLATION OF CHAPTER 387 OF THE CO OF IOWA WHICH PROHIBITED IT AND IN VIOLATI OF THE PUBLIC POLICY OF THE STATE AND IN FRA OF THE RIGHTS OF THE PREFERRED STOCKHOLDE WAS PROPERLY CANCELED WITHOUT RESTORI THE STATUS QUO ANTE.

(Answer to Petitioners' Point 3, Brief pp. 11 and 12).

First Trust & Savings Bank (formerly Bechtel Trust Co pany) and *Phoenix Finance Company vs. Iowa-Wiscon Bridge Company, et al.*, 19 Fed. Sup. 127; affirmed (8 C. A.) 98 Fed. (2) 416; certiorari denied to Supreme Co of U. S. 305 U. S. 650; rehearing denied 305 U. S. 676. T case has been quoted from, *supra*, this brief, sustaining t proposition.

In *Weir v. Day*, 57 Iowa 84 (10 N.W. 304), which was action to recover property conveyed in fraud of credito the Court at page 86 said:

> "If the plaintiff caused the conveyances to be ma to the defendant with intent to hinder, delay or d fraud his creditors, or any them, he is not entitled recover. *Holliday v. Holliday*, 10 Iowa 200; 1 Sto Eq. Jur., 61; Kerr on Frauds and Mistake, 375; *Stephe v. Harrow*, 26 Iowa, 458. The evidence abundant shows that such was his intention."

There is no question under the record in the instant case that the Bechtels by the exchange of their old common stock for new common stock intended to perpetrate a gross fraud on the preferred stockholders of the defendant corporation, and the issuance of that new common stock in exchange for the old worthless stock was a gross fraud against the preferred stockholders and the Court was right in canceling the new common stock without restoring the status quo ante. The Bechtels were not entitled to it.

In *Thronson v. Universal Manufacturing Company, et al.* (Wisc.), 159 N.W. 575, where state courts prohibited sale by corporation of its stock except for money, labor, or property received at par value and making sales in contravention thereof void, it was held that the purchaser of the stock could not recover the consideration he paid because the transaction was prohibited by law and in violation of the public policy of the state of Wisconsin, and void.

The decree cancelled the new common stock which the Bechtels had obtained in violation of the public policy of the laws of the State of Iowa and in violation of the statutes of Iowa and in fraud of the preferred stockholders. They were not entitled to that stock and the decree canceled what they were not entitled to. They had voluntarily surrendered and canceled their old worthless common stock while fraudulently obtaining the new common stock and the old common stock had ceased to exist; it was wholly worthless.

The so-called "plan of reclassification" was never legally adopted because of the fraud which inhered in it and because it violated the statutes and public policy of the State of Iowa. The petitioners in the trial court contended that the status quo ante could not be restored and offered testimony to that effect (Walter Hulstedt, Tr., Vol. 4, pp. 2615 to 2679; Court's oral finding, R. p. 366, lines 8 to 24).

The petitioners in their opening brief on appeal in the Supreme Court of Iowa, stated:

> "The stock records introduced by plaintiff for other purposes show that there were innumerable sales and purchases of the new common in the period from August 3, 1938 to February 15, 1940, as there were bound to be in a corporation with some four thousand small individual stockholders. It is therefore clear that the task of unscrambling the eggs necessary to restore the *status quo ante* would be an impossible one," (R. p. 450, lines 21 to 29).

The effect of the so-called reclassification plan is very tersely stated in the opinion of the Iowa Supreme Court.

In *State v. Bechtel*, 31 N.W. (2) 853, at 865, paragraph number 7 of the opinion, the Court said:

> "Let us see what the effect of this reclassification was so far as the 100,000 shares of worthless stock were concerned. This worthless stock under such plan was to be cancelled and there were reissued in lieu thereof the 39,468 shares of new common stock each with a value of $15.00 per share, thus giving to such shares a total dollar value of $592,020.00 of equal parity to the retired preferred stock, save as to the payment of overdue dividends. In argument, counsel characterized this transaction as 'reaching up and pulling over a half million dollars out of thin air.' Judging from its effects it can hardly be said that such was an overstatement. It seems to us that to put into effect such a transaction would be shocking to a moral or equitable conscience. It seems to us that those who professed to speak for the preferred stockholders were derelict in their duty to protect the interests of those in whose interests they were bound to act. Most of the preferred stock of the August 1, 1938 meeting was in the hands of proxies. As such proxies they would be bound to protect the interests of those for whom they were to act. It can hardly be said that they did so at this meeting."

The new common stock which the Bechtels received was properly cancelled without the restoration of the status quo ante, not only because it had been used as an instrumentality to perpetrate a fraud and contrary to the public policy of the State of Iowa but also because equity required it. The Bechtels were not entitled to profit by their own wrong. They asserted in the Supreme Court that the status quo ante could not be restored, obviously intending to retain the loot of approximately $600,000 of new common stock without paying therefor. Equity required that the new common stock issued to the Bechtels be canceled. Having taken that position before the Supreme Court of Iowa they are not now in any position to contend before this Court as a reason for writ of certiorari that status quo ante should have been restored which they contended in the lower court and in the Supreme Court of Iowa could not be done. The petitioners are not entitled to benefit by their own fraud and wrong.

POINT FOUR.

THE DEFENDANT CORPORATION HAVING OBTAINED A PERMIT FROM THE STATE OF IOWA TO TRANSACT BUSINESS IN THE STATE OF IOWA AND AGREED TO BE BOUND BY THE LAWS OF THE STATE OF IOWA, AND ALL OF ITS BUSINESS AND PROPERTY AND BOOKS AND RECORDS BEING LOCATED IN THE STATE OF IOWA, AND ALL OF ITS OFFICERS AND DIRECTORS, SAVE ONE, BEING RESIDENTS OF THE STATE OF IOWA, THE SUPREME COURT OF IOWA DID NOT ERR IN FINDING AND HOLDING THAT THE SO-CALLED RE-CLASSIFICATION WAS NOT CONTROLLED OR GOVERNED BY THE LAWS OF DELAWARE AND IN SO HOLDING DID NOT VIOLATE ANY CONSTITUTIONAL RIGHTS OF THE PETITIONERS.

(Answer to Petitioners' Point 4, Brief pp. 12, 13 and 14).

The defendant corporation obtained a permit to do business in Iowa and agreed to be bound by the laws of the State of Iowa while incorporated in Delaware. All of its business and all of its books and records and property are located in the State of Iowa, and all of its officers and directors, save one, are residents of the State of Iowa and it is subject to all of the laws of the State of Iowa.

In *German-American Coffee Co. v. Diehl*, 216 N. Y. 57, 109 N. E. 875, at 876, the eminent Justice Cardoza, speaking for the court said:

> "As long as a foreign corporation keeps away from this state it is not for us to say what it may do or not do. But when it comes into this state and transacts its business here, it must yield obedience to our laws. (*Sinnott v. Hanan*, 214 N. Y. 454, 458, 108 N. E. 858). For many purposes the fiction of its residence in the state of its origin must then be disregarded. (citing cases).

This statute makes no attempt to regulate foreign corporations while they keep within their domicile. It is aimed against them only while they elect to live within our borders. The duty which it imposes arises only when they come to us, and ends the moment that they leave us. Such a statute, however phrased, is, in effect, a condition on which the right to do business within the state depends. (Citing cases.) * * * If they take the corporation out of the state, they may declare dividends as they please. If they elect to keep it with us, they must not lead it into paths of ruin. In these days, when countless corporations, organized on paper in neighboring states, live and move and have their being in New York, a sound public policy demands that our Legislature be invested with this measure of control. If the control is irksome, it may be avoided by leaving us."

In the case of *Weiditschka v. Supreme Tent K. M. W.*, 188 Iowa 183, 170 N.W. 300, 301, 175 N.W. 835, speaking of the right of a foreign corporation to do business in Iowa the court (Ladd, C. J.) said:

"The defendant association had no right to transact business in this state without permission, and even then was bound to proceed in acccordance with its laws." (Citing many cases)

In *New York Life Insurance Co. v. Cravens*, 178 U. S. 389, 20 Sup. Ct. Rep. 962, at 967 the Court said:

"The power of a state over foreign corporations is not less than the power of a state over domestic corporations. No case declares otherwise. We said in *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281:

" 'That which a state may do with corporations of its own creation it may do with foreign corporations admitted into the state. This seems to be denied; if not generally, at least as to plaintiff in error. The denial

> is extreme and cannot be maintained. The power of a state to impose conditions upon foreign corporations is certainly as extensive as the power over domestic corporations, and is fully explained in *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters, Com. Rep. 610, 15 Sup. Ct. Rep. 207, and need not be repeated.'"

The Court had jurisdiction of the subject matter; it had jurisdiction of the corporate defendant and jurisdiction of the individual defendants, all of whom resided in Iowa, with all the books and records of the corporation within the jurisdiction of the court; nearly all the witnesses resided in Iowa and the case could be most conveniently tried in Iowa. The petitioners claim that it involved the internal affairs of the corporate defendant is wholly without merit. Under the facts developed "the corporate defendant was nothing except what is known to the law as a tramp corporation" and its residence was in fact more in Iowa than it was any place else.

> *Williams, et al. v. Green Bay and W. R. Co.*, 326 U. S. 549, 66 Sup. Ct. Rep. 284.

In *State, ex rel Weede v. Iowa Southern Utilities Co. of Delaware*, 231 Iowa 784, 2 N.W. (2) 372. In passing on the question as to rights of the Iowa courts to determine the matters presented by the petition of the plaintiff, the Court made an exhaustive review of the authorities and, among other things, said: (Record p. 110 to p. 135)

> "In passing upon these propositions, it must be kept in mind that while the appellee is a corporation organized under the laws of Delaware, it is what the authorities or decisions speak of as a 'tramp' or 'migratory' corporation. (Citing cases) 'While this practice of taking out a charter in one state to do business solely in another is probably too general and too long recognized to be questioned. The courts of a state in which such business is to be done are ordinarily reluctant to

adopt a construction of the local laws which would enable corporations, by resorting to such practice, to receive, by reason of foreign incorporation, more favorable treatment than similar corporations.'" * * * (R. p. 110)

"Speaking generally, a state may exclude a foreign corporation from transacting business within its borders, or condition its admittance, as it sees fit, providing it does not thereby violate its own Constitution or the Constitution of the United States. We have mentioned two exceptions to this rule of law. Some other exceptions are referred to in *Hanover Fire Ins. Co. v. Carr*, 272 U. S. 491, 47 S. C. 179, 71 L. Ed. 372, 49 A. L. R. 713, but the appellee comes within no exception. Many authorities could be mentioned." (Citing numerous cases from the Supreme Court of the United States and of the Supreme Court of Iowa.) * * * (R. p. 112)

"In *Am. Fidelity Co. v. Bleakley, supra,* (157 Iowa 442, 446) this Court said: The state has the undoubted right to say whether foreign corporations shall be permitted to do business here at all, and, if such permission is granted, it may be upon such terms and conditions as the state shall prescribe. And where it is the manifest intention to limit or restrict the powers given to such corporation by its charter, courts have no authority to override such legislation on the ground of comity between the states. Within its power, the state, through its legislature, is supreme, and the court's duty is ended when it determines what the statutory law is.'" (R. pp. 115-116) * * *

"In Am. Jur. Sect. 439, p. 433, the author states: 'A state has visitorial power over foreign corporations insofar as they are doing business within the state, and in connection with the acts constituting such business; and such regulation by a state is not deemed to interfere with the internal affairs or management of such corporations.'" (Citing U. S. Supreme Court cases.) * * * (R. p. 119)

"There was a time when courts would have given weight to such a statement, but we may now say it is uniformly conceded that the question is not one of jurisdiction or power in the court of a state which is not the legal domicile of a foreign corporation, but it is a question rather of *discretion* in the court as to whether it will exercise jurisdiction. It is a question of the balance of convenience, of whether considerations of public policy, efficiency, expedience and justice to all parties interested demand that jurisdiction be retained in the foreign court, or that it be declined under the rule of forum non conveniens." * * * (R. p. 123.)

In the opinion of the Supreme Court of Iowa, 31 N. W. (2) 853, Record pages 482 to 523, the Court definitely lays down the rule that the Court had full jurisdiction of all of the necessary parties and of the corporation and approved definitely the rule as laid down in the opinion by Chief Justice Bliss, heretofore referred to. We direct the Court's particular attention to Record page 507, Division VIII of the opinion to and including that part of Division VIII appearing on Record page 510, and in this the Court, among other things, said:

"Neither justice nor the practical necessities of the modern world can lend a sympathetic ear to the claim of a foreign corporation, with all of its business in Iowa —plants, records, officers, etc., that under its articles issued to it by the authority of the foreign state, it can come into our state and violate its statutory requirements." (R. p. 509)

The Statutes of Iowa under which the corporate defendant procured a permit to do business are controlling and it cannot be claimed that such statutes interfered with the contractual rights or liberties of the corporation by virtue of the Constitution of the United States since the State of Iowa has the power to compel foreign corporations to be subject to its statutes as a condition of the right to do busi-

ness in the state. The legislature of Iowa had the power to pass laws regulating and prescribing the conditions under which foreign corporations may do business in Iowa, and such legislation is not in conflict with any provisions of the Constitution of the United States. The Supreme Court of the State of Iowa has passed on and construed these statutes and this Court has held in similar cases that where the Supreme Court of a state has passed on its statutes and laws relating to conditions permitting foreign corporations to transact business within a state that this Court will follow such decisions. The enforcement of a statute applicable to a foreign corporation transacting business in Iowa can not be held to be a violation of the Constitutional rights of any stockholder of such corporation.

New York Life Insurance Co., plff in err., v. Cravens, 178 U. S. 389, 20 Sup. Ct. Rep. 962.

Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 20 Sup. Ct. Rep. 518.

POINT FIVE.

THE SUPREME COURT OF IOWA DID NOT ERR IN HOLDING THAT NO RIGHT OF PETITIONERS UNDER EITHER THE CONSTITUTION OF THE UNITED STATES OR THE STATE OF IOWA HAD BEEN VIOLATED.

1. Section 1 of Article IV. of the Federal Constitution is the full faith and credit provision.

2. No act, record, or judicial proceeding of Delaware has been denied full faith and credit. Simply because Delaware chartered the corporation that does not require the State of Iowa to admit it to transact business within its border unconditionally, nor to breach its laws.

Scottish Union and National Ins. Co. v. Herriott, 109 Iowa 606, 611 et seq., 80 N.W. 665.

3. The corporate defendant was not a citizen under Section 1 of the Fourteenth Amendment which could enter the State of Iowa in violation of conditions imposed by that state. It is being treated the same as all foreign and domestic corporations of its class. It has not been deprived of any property rights under the due process clause of the Federal Constitution, nor been subjected to any arbitrary or unreasonable conditions and has been granted equal protection of the laws.

Paul v. Commonwealth of Va., 8 Wall. 168, 19 L. ed. 357;

Ballantine, Private Corp., Sec. 287;

Thompson on Corporations, 3rd. Ed., Section 6594;

23 *Am. Jur.*, Sec. 286;

State, ex rel Weede, v. Iowa Southern Utilities Co., (R. p. 135), 231 Iowa 784, 2 N. W. (2) 372, at 395;

State, ex rel Weede, v. Bechtel, et al., (R. par. VIII., pp. 507, 508, 509), 31 N.W. (2) 853, at 864-865.

POINT SIX.

THERE IS NO MERIT IN THE PETITIONERS' CONTENTION THAT THEY WERE DEPRIVED OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF SECTION 1 OF ARTICLE IV OF THE CONSTITUTION OF THE UNITED STATES AND OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

1. The violations of the Iowa Statutes and the fraudulent character of the so-called re-classification plan and the fraudulent character of the issuance of the new common stock for the old worthless Bechtel common stock was directly in issue, not only was it directly in issue but it was

also fully litigated by the petitioners. The petitioners were represented by their present counsel from the commencement of and throughout the trial (Tr., Vol. 1, pp. 1 and 2 and throughout the Trans.). The petitioners were given full opportunity to defend and have had a fair trial.

2. The trial commenced on the First day of September 1943 (Tr. Vol. 1, p. 1). The evidence closed on the 18th day of December 1943 (R. p. 359). The trial continued for three months and eighteen days and the petitioners had ample opportunity to offer any evidence that they desired to offer.

3. The arguments of counsel for plaintiff began on December 23, 1943 and continued through December 29, 1943, six days. The argument for the corporate defendant began and closed on December 30, 1943. The argument of Mr. Cook, counsel for the defendants and for the petitioners herein, began January 6, 1944 and closed January 10, 1944, lasted four days. The reply arguments of counsel for plaintiff occupied January 11 and January 12, 1944. Further arguments by Mr. Cook, Mr. Havner and Mr. Ontjes were made at the morning session January 13, 1944, and then the Court adjourned until January 19, 1944 (R. p. 359). It will be noted that full hearing was had and ample time given to counsel for the various parties including the petitioners herein to argue the cause.

4. On January 19, 1944 at ten o'clock A. M., the trial court made his oral findings in which he discussed the issues and the evidence and stated what his findings were (R. p. 359 to p. 376).

5. It was not until two days later, January 21, 1944, that the court made and filed his written findings of fact and conclusions of law (R. p. 328, line 14 to p. 351, line 12).

6. The record shows the petitioners made no claim that the oral findings went beyond the issues nor decided any matter that was not involved. They did not suggest

any surprise on their part nor a desire for any further hearing and did not ask leave to offer additional testimony, although they had two days to do so between the time of the court's oral findings and his written findings of fact and conclusions of law (R. p. 376; Tr., Vol. 4, p. 2878).

7. The petitioners did not serve their notice of appeal to the Supreme Court of Iowa until February 21, 1944 (R. p. 351, line 14 to p. 352, line 15), not until thirty days after the court had made and filed its written findings of fact and conclusions of law. During that thirty days the petitioners made no motion to re-open the case nor ask for further hearing or opportunity to offer further evidence, and did not make any motion to set aside or to modify any of the court's findings of fact and conclusions of law.

In *S. C. Holmes, Plff., in Err., v. E. S. Conway*, 241 U. S. 624, 36 Sup. Ct. Rep. 681, at 683, the Court said:

> "At the final trial he was given full opportunity to defend himself in his own way and to an extent satisfactory to himself. Consequently every requirement of due process of law has been satisfied, * * *
>
> "Considering Holmes's position as an officer of the court, and patient hearings accorded him, his own testimony, and duty to offer in evidence whatever was obtainable and material, his actual presence at every stage of the proceedings, *his failure to suggest surprise or desire for any further hearing, the inquiry touching his conduct, pending for many months*, his perfect acquaintance with all the unusual circumstances including his own liability, and looking at the substance, and not mere form, of things, we are unable to say that he has been deprived of adequate notice or fair opportunity to defend, and thereby denied due process of law." (Italics supplied)

In *Iowa Cent. Ry. Co. v. State of Iowa*, 160 U. S. 389, 16 Sup. Ct. Rep. 344, it is held: "It is not a right, privilege, or immunity of a citizen of the United States, within the

meaning of Const. Amend. 14, to have a controversy in the state court prosecuted or determined by one form of action, rather than by another. The Court said:

> "Whether the court of last resort of the state of Iowa properly construed its own constitution and laws, in determining that the summary process under those laws was applicable to the matter which it adjudged, *was purely the decision of a question of state law, binding upon this court.* Mere irregularities in the procedure, if any, were matters solely for the consideration of the judicial tribunal within the state empowered by the laws of the state to review and correct errors committed by its courts. Such errors affect merely matters of state law and practice, in no way depending upon the constitution of the United States, or upon any act of Congress. *Ludeling v. Chaffe*, 143 U. S. 301, 305, 12 Sup. Ct. 439. (Italics supplied.)
>
> "As said by this court, speaking through Mr. Chief Justice Fuller, in *Leeper v. Texas*, 139 U. S. 462, 11 Sup. Ct. 577: 'Law in its regular course of administration through courts of justice, is due process; and, when secured by the law of the state, the constitutional requirement is satisfied.' There was a 'regular course of administration' in the case at bar, as that term was employed in the case cited."

CONCLUSION.

We respectfully submit that the petition for writ of certiorari should be denied.

H. M. HAVNER,
FRED A. ONTJES,
Counsel for Respondents.

HAVNER & POWERS,
Of Counsel.

APPENDIX.

CODE OF IOWA, 1939.

Chapter 387.

Section 8433. Capital Stock and Permit. Sections 8412 to 8416, inclusive, and 8420 to 8428, inclusive, are hereby made applicable to any foreign corporation which directly or indirectly owns, uses, operates, controls, or is concerned in the operation of any public gasworks, electric light plant, heating plant, waterworks, interurban or street railway located within the state, or the carrying on or any gas, electric light, electric power, heating business, waterworks, interurban or street railway business within the state, or that owns or controls, directly or indirectly, any of the capital stock of any corporation which owns, uses, operates or is concerned in the operation of any public gasworks, electric light plant, electric power plant, heating plant, waterworks, interurban or street railway located within the state, or any foreign corporation that exercises any control in any way or in any manner over any of said works, plants, interurban or street railways or the business carried on by said works, plants, interurban or street railways by or through the ownership of the capital stock of any corporation or corporations or in any other manner whatsoever, and the ownership, operation, or control of any such works, plants, interurban or street railways or the business carried on by any of such works or plants or the ownership or control of the capital stock in any corporation owning or operating any of such works, plants, interurban or street railways by any foreign corporation in violation of the provisions of this chapter is hereby declared to be unlawful. (S13. Sec. 1641-1; C24, 27, 31, 35, Sec. 8433.)

Section 8434. Holding Companies. The provisions of this chapter are hereby made applicable to all corporations, including so-called "holding companies" which by or through the ownership of the capital stock in any other corporation or corporations or a series of corporations owning or controlling the capital stock of each other can or

may exercise control over the capital stock of any corporation which owns, uses, operates, or is concerned in the operation of any public gasworks, electric light plant, electric power plant, heating plant, waterworks, interurban or street railway located in the state, or the business carried on by such works or plants. (S13, Sec. 1641-m; C24, 27, 31, 35 Sec. 8434)

Section 8435. Annual Report—fee. All corporations subject to the provisions of this chapter are hereby required to pay the annual fee and to make the annual report in the form and manner and at the time as specified in Chapter 388. (S13, Sec. 1641-n; C24, 27, 31, 35, Sec. 8435.)

Section 8436. Sale of Capital Stock. The provisions of this chapter are hereby made applicable to the sale of its own capital stock by any corporation subject to the provisions of this chapter, whether said capital stock has been heretofore issued by said corporation or not, including the sale of so-called "treasury stock" or stock of the corporation in the hands of a trustee or where the corporation participates in any way or manner in the benefits of said sales, and also to the sale of any of the obligations of any corporation subject to the provisions of this chapter, the payment of which is secured by the deposit or pledge of any of the capital stock of said corporation. (S13, Sec. 1641-o; C24, 27, 31, 35, Sec. 8436.)

Section 8437. Violations—stock void. Shares of capital stock of any corporation owned or controlled in violation of the provisions of this chapter shall be void and the holder thereof shall not be entitled to exercise the powers of a shareholder of said corporation or permitted to participate in or be entitled to any of the benefits accruing to shareholders of said corporation, and sections 8430 to 8432, inclusive, are hereby made applicable to violations of the provisions of this chapter; and courts and juries shall construe this chapter so as to prevent evasion and to accomplish the intents and purposes hereof. (S13, Sec. 1641-p; C24, 27, 31, 35, Sec. 8437)

Section 8438. Dissolution—receiver. Courts of equity shall have full power to dissolve, close up, or dispose of any business or property owned, operated or controlled in violation of the provisions of this chapter; to dissolve any corporation owning or controlling the capital stock of any other corporation in violation of the provisions of this chapter and to close up or dispose of the business or property of said corporation; and if the court finds that, in order to carry out the purposes of this chapter, it is necessary so to do, it may dissolve the corporation issuing the stock which is owned in violation of the provisions of this chapter, close up the business of said corporation and dispose of its property, and the court may also appoint a receiver who shall be a resident of Iowa for any business or for any corporation which has violated the provisions thereof or of the corporation issuing the stock which is held in violation thereof. Any action to enforce the provisions of this chapter may be instituted by the attorney general in the name of the state of Iowa or by a citizen in the name of the state of Iowa at his own proper cost and expense, reserving, however, to the stockholders owning capital stock not held in violation of this chapter all rights possessed by them. (S13, Sec. 1641-q; C24, 27, 31, 35, Sec. 8438)

CHAPTER 385.

Code of 1939.

Section 8412. Par value Required. No corporation organized under the laws of this state, except building and loan associations, shall issue any certificate of a share of capital stock, or any substitute therefor, until the corporation has received the par value thereof. (S13, Sec. 1641-b C24, 27, 31, 35, Sec. 8412)

Section 8413. Payment in property other than cash. If it is proposed to pay for said capital stock in property or in any other thing than money, the corporation proposing the same must, before issuing capital stock in any form apply to the executive council of the state for leave so to do. Such application shall state the amount of capital stock

proposed to be issued for a consideration other than money, and set forth specifically the property or other thing to be received in payment for such stock. (S13, Sec. 1641-b; C24, 27, 31, 35, Sec. 8413)

Section 8414. Executive Council to Fix Amount. The executive council shall make investigation, under such rules as it may prescribe, and ascertain the real value of the property or other things which the corporation is to receive for the stock. It shall enter its finding, fixing the value at which the corporation may receive the same in payment for capital stock; and no corporation shall issue capital stock for said property or thing in a greater amount than the value so fixed. (S13; Sec. 1641-b, C24, 27, 31, 35, Sec. 8414.)

Section 8415. Elements Considered in Fixing Amount. For the purpose of encouraging the construction of new steam or electric railways and manufacturing industries within this state, the labor performed in effecting the organization and promotion of such corporation, and the reasonable discount allowed or reasonable commission paid in negotiating and effecting the sale of bonds for the construction and equipment of such railroad or manufacturing plant, shall be taken into consideration by said council as elements of value in fixing the amount of capital stock that may be issued. (S13, Sec. 1641-b; C24, 27, 31, 35, Sec. 8415.)

Section 8416. Certificate of Issuance of Stock. It shall be the duty of every corporation, except corporations qualified under chapter 386 or chapter 417, to file a certificate under oath with the secretary of state, within ten days after the issuance of any capital stock, stating the date of issue, the amount issued, the sum received therefor, if payment be made in money, or the property or thing taken, if such be the method of payment. (S13, Sec. 1641-c; C24, 27, 31, 35, Sec. 8416.)

CHAPTER 386.

Code of 1939.

Section 8420. Application for Permit. Any corporatio for pecuniary profit organized under the laws of anoth state, or of any territory of the United States, or of a foreign country, which has transacted business in the sta of Iowa since September 1, 1886, or desires hereafter transact business in this state, and which has not a perm to do such business, shall file with the secretary of state certified copy of its articles of incorporation, duly attest by the secretary of state or other state officer, in who office the original articles were filed, accompanied by resolution of its board of directors or stockholders authori ing the filing thereof, and also authorizing the filing there and also authorizing service of process to be made up any of its officers or agents in this state engaged in tra acting its business, and requesting the issuance to su corporation of a permit to transact business in this stat said application to contain a stipulation that such perm shall be subject to the provisions of this chapter. (C97, S 1637; S13, Sec. 1637; C24, 27, 31, 35, Sec. 8420.)

Section 8421. Details of Application—Secretary State as process Agent. Said application shall also co tain a statement subscribed and sworn to by at least t of the principal officers of the corporation, setting for the following facts, to-wit:

1. The total authorized capital of the corporation.

2. The total paid up capital of the corporation.

3. The total value of all assets of the corporation, i cluding money and property other than money represent by capital, surplus, undivided profits, bonds, promisso notes, certificates of indebtedness or other designatio whether carried as money on hand or in bank, real est or personal property of any description.

4. The total value of money and all other property the corporation has in use or held as investment in the state, at the time the statement if made (if any).

5. The total value of money and all other property the corporation proposes or expects to make use of in the state, during the ensuing year.

6. Certified copy of the resolution of the board of directors of said corporation giving name and address in Iowa of a resident agent on whom the service of original notice of civil suit in the courts of this state may be served. Failing which, or in the event such agent may not be found within the state, service of such process may then be made upon said corporation through the secretary of state by sending the original and two copies thereof to him, and on the original of which he shall accept service on behalf of said corporation, retain one copy for his files and send the other by registered mail to the corporation at the address of its home office as shown by the records in his office, which service shall have the same force and effect as if lawfully made upon said corporation within the county where such civil suit could be maintained against it under the laws of this state. (S13; Sec. 1637; C24, 27, 31, 35, Sec. 8421.)

Section 8422. Secretary of State to Determine Values. The secretary of state can make such independent and further investigation as to the property within this state owned by any such corporation as he may desire, and upon the true facts determine the value thereof, and fix the fee to be paid by such company. (S13, Sec. 1637; C24, 27, 31, 35, Sec. 8422)

Section 8423. Fees. Before a permit is issued authorizing such corporation to transact business in the state, said corporation shall file with the secretary of state a certified copy of the articles of incorporation, with resolution and statement as previously set forth, and pay a filing fee of twenty-five dollars upon ten thousand dollars or less of money and property of such company actually within the state, and of one dollar for each one thousand dollars of

such money or property within this state in excess of thousand dollars. (C97, Sec. 1637; S13, Sec. 1637; C24 31, 35, Sec. 8423.)

Section 8424. Increase of capital—blanks. If from to time the amount of money or other property in us the state by said foreign corporation is increased, corporation shall at the time of said increase, or at time of making annual report to the secretary of stat July of each year, file with the secretary of state a sw statement showing the amount of such increase and s pay a filing fee thereon of one dollar for each one thous dollars or fraction thereof of such increase. The secre of state shall upon request furnish a blank upon whic make report of such increase of capital in use within state. (C97, Sec. 1637, S13, Sec. 1637; C24, 27, 31, 35, 8424.)

Section 8425. Exemption. Any corporation transac business in this state prior to September 1, 1886, shal exempt from the payment of the fees required under provisions of sections 8423 and 8424. (C97, Sec. 1637; Sec. 1637, C24, 27, 31, 35, Sec. 8425.)

Secti 8426. Issuance of permit—effect. The se tary of state, shall thereupon issue to such corporatio permit, in such form as he may prescribe, for the transac of the business of such corporation, and upon the recei such permit said corporation shall be permitted and aut ized to conduct and carry on its business in this state. (Sec. 1637; S13, Sec. 1637; C24, 27, 31, 35, Sec. 8426.)

Section 8427. Denial of Right to Sue. No foreign s corporation doing business in this state shall maintain action in this state upon any contract made by it in state unless prior to the making of such contract it have procured such permit. This prohibition shall apply to any assignee of such foreign stock corporation to any person claiming under such assignee of such fo corporation or under either of them. (C24, 27, 31, 35, 8427.)

Section 8428. Alphabetical Records Required. The secretary of state shall number consecutively all such certified copies heretofore and hereafter filed in his office and shall maintain a card index thereof arranged and shall preserve the same and the originals of said certified copies as permanent records of his office. (C24, 27, 31, 35, Sec. 8428.)

Section 8430. Violations by corporations. Any foreign corporation that shall carry on its business in violation of the provisions of this chapter in the state of Iowa, by its officers, agents, or otherwise, without having complied with the preceding sections of this chapter and taken out and having a valid permit, shall forfeit and pay to the state, for each and every day in which such business is transacted and carried on, the sum of one hundred dollars, to be recovered by suit in any court having jurisdiction. (C97, Sec. 1639, C24, 27, 31, 35, Sec. 8430.)

Section 8431. Violation by Officers. Any agent, officer, or employee who shall knowingly act or transact such business for such corporation, when it has no valid permit as provided herein, shall be guilty of a misdemeanor, and for such offense shall be fined not to exceed one hundred dollars, or be imprisoned in the county jail not to exceed thirty days, or be punished by both such fine and imprisonment, and pay all costs of prosecution. (C97, Sec. 1639, C24, 27, 31, 35, Sec. 8431.)

Section 8432. Status of Corporation and Officers. Nothing contained in this chapter shall relieve any person, company, corporation, association or partnership from the performance of any duty or obligation now enjoined upon or required of it, or from the payment of any penalty or liability created by the statutes heretofore in force, and all foreign corporations, and the officers and agents thereof, doing business in this state shall be subject to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers. (C87, Sec. 1639; C24, 27, 31, 35, Sec. 8432.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 732

GEORGE M. BECHTEL, Executor of the Will of MARTHA R. BECHTEL, Deceased, GEORGE M. BECHTEL and HAROLD R. BECHTEL,

Petitioners,

vs.

ILA FAY THATCHER, NANCY ROSSEAU, ELSEY SCOTT and STATE OF IOWA, ex rel J. B. WEEDE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

BRIEF OF RESPONDENT STATE OF IOWA, EX REL. J. B. WEEDE IN OPPOSITION.

H. M. HAVNER,
of Des Moines, Iowa,
FRED A. ONTJES,
of Mason City, Iowa,
Counsel for Respondents.

HAVNER & POWERS,
of Des Moines, Iowa,
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BRIEF OF RESPONDENT STATE OF IOWA, EX REL J. B. WEEDE IN OPPOSITION.

COMES NOW the respondent State of Iowa, ex rel J. B. Weede, and adopts the entire brief of the respondents Ila Fay Thatcher, Nancy Rosseau and Elery Scott in opposition in all its parts to avoid repetition.

This respondent further states that the object of Chapter 387 of the 1939 Code of Iowa was to prevent foreign public utility corporations from issuing watered stock to those on the inside and to protect the public, the citizens of Iowa, against such acts.

Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

H. M. HAVNER,
FRED A. ONTJES,
Counsel for Respondent.

HAVNER & POWERS,
Of Counsel.